

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17891

853

SOUTHERN RAILWAY COMPANY, *et al.*,

Appellants,

—against—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 5 1963

Nathan J. Paulson
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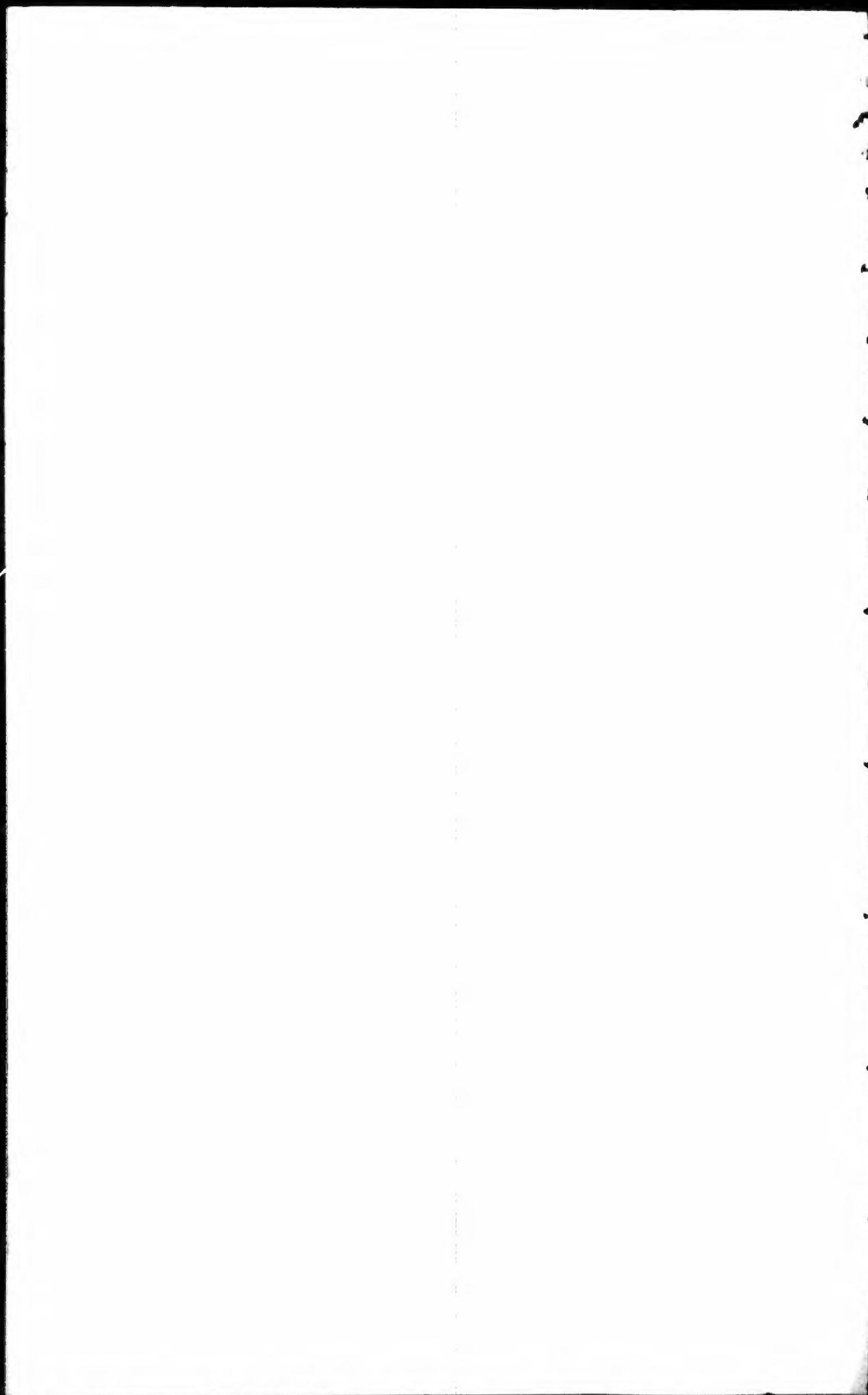


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Complaint

IN THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2881—62

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Plaintiff,

—v.—

SOUTHERN RAILWAY COMPANY, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, THE NEW ORLEANS TERMINAL COMPANY, GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, ST. JOHNS RIVER TERMINAL COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY,

Defendants.

COMPLAINT FOR INJUNCTION

Comes now Brotherhood of Locomotive Firemen and Enginemen, and for its cause of action against the above-named defendants, alleges and avers as follows:

(1) Plaintiff is a national railway labor organization, having its principal office and headquarters at Cleveland, Ohio. Plaintiff has been for many years, and now is, the duly designated and authorized representative of the firemen's crafts, for the purposes of the Railway Labor Act, employed on the defendant railroads. Plaintiff, acting through its general chairman, Ralph L. McCollum, and its General Grievance Committee, representing the firemen's

Complaint

crafts employed on the defendant railroads and also certain other railroads which, together with the named-defendants, constitute the Southern Railway System, has during many years prior to the filing of this action negotiated and entered into collective bargaining agreements with the defendants and other carriers constituting the Southern Railway System for the purpose of establishing the rates of pay, rules, and working conditions pertaining to the firemen's crafts employed on the Southern Railway System, pursuant to the requirements of the Railway Labor Act.

(2) The Southern Railway Company and the other named defendants herein, together with other railway companies which collectively constitute the Southern Railway System, maintain their principal offices in Washington, D. C., and are managed and operated by officers who function as the management of the entire Southern Railway System. Said defendants are engaged in interstate commerce, are "carriers" as defined in Section 1 of the Railway Labor Act (45 U.S.C. Sec. 151), and are subject to the provisions of said Act.

(3) On or about June 30, 1947, plaintiff, acting as collective bargaining representative of the firemen's crafts employed on most of the eastern, western, and southeastern railroads of the country, served certain proposals regarding the employment of firemen and Diesel helpers on said railroads, pursuant to Section 6 of the Railway Labor Act (45 U.S.C. Sec. 156). On or about the same date certain counterproposals were served by said railroads on the plaintiff pursuant to Section 6 of the Railway Labor Act. Negotiations between the parties followed but they were unable to arrive at an agreement, and an Emergency Board was appointed by the President of the United States, pursuant to Section 10 of the Railway Labor Act (45 U.S.C. Sec. 160)

Complaint

to investigate the dispute between the parties and to report to the President.

(4) Said Emergency Board submitted its report, together with its Findings and Recommendations, to the President of the United States on September 19, 1949, and thereafter the parties settled their dispute by entering into a certain Mediation Agreement (Case A-3391), dated May 17, 1950. The defendants party to the instant suit, other than the last-named defendant, were parties to said Mediation Agreement, and said Agreement has continued to be, and now is, in effect.

(5) Section 4 of said Agreement reads as follows:

"Section 4—A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;" (with exceptions not relevant to the instant suit).

The same rule, with exceptions not relevant hereto, constitutes section 3 of an agreement between plaintiff and the last-named defendant entered into January 10, 1946 which agreement has been in effect at all times since said date.

(6) Plaintiff says that Section 2, First, Section 2, Seventh, and Section 6 of the Railway Labor Act read respectively as follows:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions,"

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements

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except in the manner prescribed in such agreements or in section 6 of this Act."

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes should be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(7) Notwithstanding the requirements of the law as contained in said provisions of the Railway Labor Act, defendants began, on or about July 13, 1959, violating said agreements by intentionally and deliberately operating freight and passenger trains and switching locomotives, or requiring such trains and locomotives to be operated, without a locomotive fireman or helper, taken from the seniority ranks of the firemen's crafts, being a part of the crew of said trains or locomotives, or by assigning employees from other crafts to take the place and perform the services of

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the fireman or helper in the crews of said trains or locomotives.

(8) Defendants have continued to violate said agreements in the manner described in paragraph 7, *supra*, from July 13, 1959, to the present time, on so many and sundry occasions that it would be burdensome to list herein the time, place, and circumstance of each violation, but plaintiff is prepared to offer proof of the same before this Court.

(9) The plaintiff, acting through its general chairman on the Southern Railway System, has repeatedly and persistently protested to the defendants their violations of said agreements. But defendants have neglected, failed, and refused to cease said violations or to take such steps as might be necessary to avoid committing said violations, and, as a consequence thereof, the members of the firemen's crafts employed on the Southern Railway System decided to leave their employment in a strike effective 6 A.M., July 26, 1960. The National Mediation Board, having been advised of the employees' determination to strike, proffered its services on July 22, 1960, under Section 5, First, of the Railway Labor Act, on the ground that a labor emergency existed. The dispute was designated Case E-240. Plaintiffs thereupon agreed to delay the effective date of the strike.

(10) The National Mediation Board continued its efforts to mediate the dispute, but without success, and on June 4, 1962, the Mediation Board closed its file on Case E-240 and terminated its jurisdiction over the dispute.

(11) Plaintiff says that the defendants' continued, persistent, and deliberate violations of Section 4 of the Mediation Agreement, as herein set forth, is forbidden by Sec-

Complaint

tion 2, First and Section 2, Seventh of the Railway Labor Act.

Wherefore, plaintiff prays:

(1) That this Court issue a preliminary injunction ordering defendants to cease and desist violating Section 4 of the Mediation Agreement and section 3 of the agreement of January 10, 1946 by henceforth operating its trains and switching locomotives with a locomotive fireman or helper, taken from the ranks of the firemen's crafts, as a member of the crew of said trains and locomotives until such time as this action is heard and decided on its merits, or until such time as Section 4 of the Mediation Agreement is changed in the manner prescribed by the Railway Labor Act;

(2) That said temporary injunction be made permanent;
~~and~~

(3) That plaintiff be accorded such other and further relief, including costs, as this Court may determine to be meet and proper.

Respectfully submitted,

MILTON KRAMER

Schoene and Kramer
1625 K Street, N. W.
Washington 6, D. C.

HAROLD C. HEISS
RUSSELL B. DAY

Heiss, Day and Bennett
Keith Building
Cleveland 15, Ohio

Counsel for Plaintiff

Answer

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Defendants, for their answer to the complaint herein, allege as follows:

First Defense

1. Deny that this Court has jurisdiction of this action, as more fully stated in the Second, Third, Fifth, Sixth and Seventh Defenses hereinafter alleged.
2. Defendants deny each and every allegation set forth in paragraph "5" of the complaint, except that they admit that the first phrase in the first sentence of Section 4 of the agreement referred to in paragraphs "4" and "5" of the complaint states: "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;" and that this phrase constitutes a like portion of Section 3 of an agreement between plaintiff and the last-named defendant entered into January 10, 1946.
3. Deny each and every allegation set forth in paragraph "7" of the complaint.
4. Deny each and every allegation set forth in paragraph "8" of the complaint.

Answer

5. Defendants deny each and every allegation set forth in paragraph "9" of the complaint, except that they admit that the National Mediation Board proffered its services on July 22, 1960, under Section 5, First (B) of the Railway Labor Act, that the dispute was designated Case E-240 and that plaintiff thereupon postponed the strike date set for July 26, 1960.

6. Deny each and every allegation set forth in paragraph "11" of the complaint.

Second Defense

7. The agreement referred to in paragraphs "4" and "5" of the complaint, dated May 17, 1950, between plaintiff and all defendants but the Carolina and Northwestern Railway Company, is annexed hereto as Exhibit "A" and made a part hereof. Section 7 of that agreement provides:

"Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement or of the agreements identified in Section 1 hereof, may be referred by either the carrier or representatives of the employees concerned to a committee, the carrier members of which shall be members of the Carriers' Conference Committees signatories hereto or their successors or representatives; and the Brotherhood members of which shall be the International President, or his representative, together with nine General Chairmen selected by the Brotherhood. Interpretation or application agreed upon by such committee shall be final and binding upon the parties to such dispute or controversy.

"This provision is not intended to prohibit the parties from filing claims with the National Railroad Ad-

Answer

justment Board in the manner provided in the Railway Labor Act as amended, but if the committee provided for herein agrees upon an interpretation or application of the affected provisions of the agreement, such claims shall be withdrawn and settled in accordance with the decision of the committee.

"Note: This provision does not supersede the provisions of the two Arbitration Agreements executed this date."

8. The agreement referred to in paragraphs "4" and "5" of the complaint, dated January 10, 1946, between plaintiff and the Carolina and Northwestern Railway Company, last-named defendant herein, is annexed hereto as Exhibit "B" and made a part hereof.

9. The complaint presents disputes "growing out of grievances" and concerning only "the interpretation or application of agreements concerning rates of pay, rules, or working conditions," as those terms are used in Section 3(i) of the Railway Labor Act, 45 U.S.C. §153(i).

10. Plaintiff has neither "handled" these disputes "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;" nor has it referred them to the National Railroad Adjustment Board or to the "committee" provided for in Section 7 of the agreement dated May 17, 1950, annexed hereto as Exhibit "A."

11. This Court lacks jurisdiction over the subject matter of this action because the complaint presents disputes which, under the Railway Labor Act, are within the exclusive jurisdiction of the National Railroad Adjustment Board.

Answer

Third Defense

12. Defendants repeat, reiterate and reallege each and every allegation set forth in paragraphs "7," "8," "9," and "10" of this answer.

13. This Court lacks jurisdiction over the subject matter of this action because plaintiff has failed to handle these disputes" and/or has failed to refer said disputes to the operating officer of the carrier designated to handle such National Railroad Adjustment Board and/or to the "committee" provided for in Section 7 of the agreement, dated May 17, 1950, annexed hereto as Exhibit "A."

Fourth Defense

14. The complaint fails to state a claim against defendants upon which relief can be granted.

Fifth Defense

15. Defendants repeat, reiterate and reallege each and every allegation of paragraphs "7" and "8" of this answer.

16. This Court lacks jurisdiction over the subject matter, because (a) this action does not arise under the Constitution or the laws or treaties of the United States and (b) there is an absence of the requisite diversity of citizenship required to confer jurisdiction under Section 1332 of the Judicial Code of the United States, 28 U.S.C. §1332.

Sixth Defense

17. Defendants repeat, reiterate and reallege each and every allegation set forth in paragraphs "7" and "8" of this answer.

Answer

18. The complaint presents a "labor dispute" within the meaning of that term as used in the Norris-LaGuardia Act, 29 U.S.C. §§101-115, inclusive.

19. This Court is denied jurisdiction to grant the injunctive relief sought by plaintiff.

Seventh Defense

20. The complaint fails to set forth a "statement of the grounds upon which the court's jurisdiction depends", as required by Rule 8 of the Federal Rules of Civil Procedure, 28 U.S.C., Rule 8.

WHEREFORE these defendants pray that the complaint be dismissed and that they be awarded the costs and disbursements of this action.

HAMILTON AND HAMILTON

By: THOMAS A. FLANNERY

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BURTON A. ZORN

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New York 22, New York

Amended Answer

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Defendants, for their amended answer to the complaint herein, allege as follows:

First Defense

1. Deny that this Court has jurisdiction of this action, as more fully stated in the Second, Third, Fifth, Sixth, Seventh and Tenth Defenses hereinafter alleged.

2. Defendants deny each and every allegation set forth in paragraph "5" of the complaint, except that they admit that the first phrase in the first sentence of Section 4 of the agreement referred to in paragraphs "4" and "5" of the complaint states: "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;" and that this phrase constitutes a like portion of Section 3 of an agreement between plaintiff and the last-named defendant entered into January 10, 1946.

3. Deny each and every allegation set forth in paragraph "7" of the complaint.

4. Deny each and every allegation set forth in paragraph "8" of the complaint.

Amended Answer

5. Defendants deny each and every allegation set forth in paragraph "9" of the complaint, except that they admit that the National Mediation Board proffered its services on July 22, 1960, under Section 5, First (B) of the Railway Labor Act, that the dispute was designated Case E-240 and that plaintiff thereupon postponed the strike date set for July 26, 1960.

6. Deny each and every allegation set forth in paragraph "11" of the complaint.

Second Defense

7. The agreement referred to in paragraphs "4" and "5" of the complaint, dated May 17, 1950, between plaintiff and all defendants but the Carolina and Northwestern Railway Company, is annexed hereto as Exhibit "A" and made a part hereof. Section 7 of that agreement provides:

"Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement or of the agreements identified in Section 1 hereof, may be referred by either the carrier or representatives of the employees concerned to a committee, the carrier members of which shall be members of the Carriers' Conference Committees signatories hereto or their successors or representatives; and the Brotherhood members of which shall be the International President, or his representative, together with nine General Chairmen selected by the Brotherhood. Interpretation or application agreed upon by such committee shall be final and binding upon the parties to such dispute or controversy.

Amended Answer

"This provision is not intended to prohibit the parties from filing claims with the National Railroad Adjustment Board in the manner provided in the Railway Labor Act as amended, but if the committee provided for herein agrees upon an interpretation or application of the affected provisions of the agreement, such claims shall be withdrawn and settled in accordance with the decision of the committee.

"*Note:* This provision does not supersede the provisions of the two Arbitration Agreements executed this date."

8. The agreement referred to in paragraphs "4" and "5" of the complaint, dated January 10, 1946, between plaintiff and the Carolina and Northwestern Railway Company, last-named defendant herein, is annexed hereto as Exhibit "B" and made a part hereof.

9. The complaint presents disputes "growing out of grievances" and concerning only "the interpretation or application of agreements concerning rates of pay, rules, or working conditions," as those terms are used in Section 3(i) of the Railway Labor Act, 45 U. S. C. §153(i).

10. Plaintiff has neither "handled" these disputes "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;" nor has it referred them to the National Railroad Adjustment Board or to the "committee" provided for in Section 7 of the agreement dated May 17, 1950, annexed hereto as Exhibit "A."

11. On or about January 14, 1963, defendants submitted these disputes to the First Division of the National Rail-

Amended Answer

road Adjustment Board, where these disputes are pending determination. A copy of the submission to the National Railroad Adjustment Board is annexed hereto as Exhibit "C" and made a part hereof.

12. This Court lacks jurisdiction over the subject matter of this action because the complaint presents disputes which, under the Railway Labor Act, are within the exclusive jurisdiction of the National Railroad Adjustment Board.

Third Defense

13. Defendants repeat, reiterate and reallege each and every allegation set forth in paragraphs "7," "8," "9," "10," and "11" of this answer.

14. This Court lacks jurisdiction over the subject matter of this action because plaintiff has failed to handle these disputes "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and/or has failed to refer said disputes to the National Railroad Adjustment Board and/or to the "committee" provided for in Section 7 of the agreement, dated May 17, 1950, annexed hereto as Exhibit "A."

Fourth Defense

15. The complaint fails to state a claim against defendants upon which relief can be granted.

Fifth Defense

16. Defendants repeat, reiterate and reallege each and every allegation of paragraphs "7" and "8" of this answer.

Amended Answer

17. This Court lacks jurisdiction over the subject matter, because (a) this action does not arise under the Constitution or the laws or treaties of the United States and (b) there is an absence of the requisite diversity of citizenship required to confer jurisdiction under Section 1332 of the Judicial Code of the United States, 28 U. S. C. §1332.

Sixth Defense

18. Defendants repeat, reiterate and reallege each and every allegation set forth in paragraphs "7" and "8" of this answer.

19. The complaint presents a "labor dispute" within the meaning of that term as used in the Norris-LaGuardia Act, 29 U. S. C. §§101-115, inclusive.

20. This Court is denied jurisdiction to grant the injunctive relief sought by plaintiff.

Seventh Defense

21. This Court is denied jurisdiction to grant the injunctive relief sought by plaintiff, because plaintiff has failed to comply with obligations imposed by law which are involved in the labor dispute in question and has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration, as required by the Norris-LaGuardia Act, 29 U. S. C. §108.

Eighth Defense

22. Plaintiff is barred by its unclean hands from obtaining the injunctive relief it seeks.

Amended Answer

Ninth Defense

23. Plaintiff is barred by laches from obtaining the injunctive relief it seeks.

Tenth Defense

24. The complaint fails to set forth a "statement of the grounds upon which the court's jurisdiction depends", as required by Rule 8 of the Federal Rules of Civil Procedure, 28 U. S. C., Rule 8.

WHEREFORE these defendants pray that the complaint be dismissed and that they be awarded the costs and disbursements of this action.

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EXHIBIT B ANNEXED TO AMENDED ANSWER

MEMORANDUM OF AGREEMENT

This Agreement entered into this 10th day of January, 1946, by and between the carriers listed as signatory hereto, as party of the first part, and the locomotive firemen of said carriers, as represented by the Brotherhood of Locomotive Firemen and Enginemen signatory hereto by its duly authorized General Chairman, as party of the second part.

WHEREAS, on or about May 10, 1941, certain proposals on behalf of the class of employees hereinbefore referred to were served on the carriers parties hereto by the Brotherhood of Locomotive Firemen and Enginemen; and

WHEREAS, the parties have conferred with respect to said proposals of May 10, 1941; and,

NOW THEREFORE IT IS MUTUALLY AGREED:

1. To put into effect rates for Firemen and Helpers as specifically set out in Appendix "A" attached hereto and made a part hereof.
2. Steam locomotives of the 4-8-4 and 2-10-4 type to be reclassified for pay purposes by being moved into the next higher wage bracket.
3. A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; provided that the term "locomotives" does not include any of the following:
 - (a) Diesel-electric, oil-electric, gas-electric, other internal combustion, steam-electric, or electric, of not more than 90,000 pounds weight on drivers, in service performed by yard crews within designated switching limits.

Exhibit B Annexed to Amended Answer

- (b) Electric car service, operated in single or multiple units.
- (c) Gasoline, Diesel-electric, gas-electric, oil-electric, or other rail motor cars, which are self-propelled units (sometimes handling additional cars) but distinguished from locomotives in having facilities for revenue lading or passengers in the motor car; except that new rail motor cars installed after March 15, 1937 which weigh more than 90,000 pounds on drivers shall be considered "locomotives".

If the power plants of existing rail motor cars be made more powerful by alteration, renewal, replacement, or any other method, to the extent that more trailing units can be pulled than could have been pulled with the power plants which were in the rail motor cars on March 15, 1937, such motor cars, if then weighing more than 90,000 pounds on drivers shall be considered "locomotives".

- (d) Self-propelled machines used in maintenance of way, maintenance of equipment, stores department, and construction work, such as locomotive cranes, ditchers, clam-shells, pile drivers, scarifiers, wrecking derricks, weed burners, and other self-propelled equipment or machines. This will not prejudice local handling on individual railroads where disputes arise as to whether or not the character of work performed by these devices constitutes road or yard engine service.
4. On multiple-unit Diesel-electric locomotives on high-speed, streamlined, or main line through passenger trains a fireman (helper) shall be in the cab at all times

Exhibit B Annexed to Amended Answer

when the train is in motion. If compliance with the foregoing requires the service of an additional fireman (helper) on such trains to perform the work customarily done by firemen (helpers), he shall be taken from the seniority ranks of the firemen, in which event the working conditions and rates of pay of each fireman shall be those which are specified in the firemen's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

(Note—The term "main line through passenger trains" includes only trains which make few or no stops.)

Nothing contained herein requires that two men shall be in the cab at all times when the train is in motion or the assignment of an additional or second fireman (helper) on multiple-unit Diesel-electric locomotives in any other class of service, but if an additional man is employed to perform the work customarily performed by firemen (helpers) such man shall also be taken from the seniority ranks of the firemen and his working conditions and rates of pay shall be those which are specified in the firemen's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

Nothing contained herein requires the assignment of an additional or second fireman (helper) on straight electric locomotives in multiple-unit operation.

5. Except as specifically provided herein, this agreement does not modify or supersede existing agreements covering rates of pay, rules, and working conditions of locomotive firemen, helpers, hostlers, and outside hostler helpers.
6. This is a separate agreement by and on behalf of the carriers listed as signatory hereto and their employees

Exhibit B Annexed to Amended Answer

represented by the Brotherhood of Locomotive Firemen and Enginemen and is in full settlement of the second party's proposals of May 10, 1941, and shall continue in effect, subject to change under the provisions of the Railway Labor Act as amended.

7. This agreement and the rates of pay shown in Appendix "A" attached hereto and made a part hereof, are effective January 1, 1946.

For the Employees:

(s) L. B. JOHNSON
General Chairman,
BROTHERHOOD OF LOCOMOTIVE
FIREMEN AND ENGINEMEN

For the Carriers:

(s) M. H. RAMSEY
Vice President,
BLUE RIDGE RAILWAY COM-
PANY, CAROLINA AND NORTH-
WESTERN RAILWAY COMPANY,
DANVILLE AND WESTERN
RAILWAY COMPANY, HIGH
POINT, RANDLEMAN, ASHE-
BORO AND SOUTHERN RAIL-
ROAD COMPANY, YADKIN RAIL-
ROAD COMPANY.

Amendments to Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2881-62

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Plaintiff,
v.
SOUTHERN RAILWAY COMPANY, *et al.,*
Defendants.

Comes now the plaintiff, and pursuant to leave of Court first obtained, amends its complaint as follows:

1. Preceding paragraph numbered (1) there is inserted the caption "First Claim".
2. Following paragraph (11), and preceding the prayer for relief, there is added the following:

Second Claim

Plaintiff, for its Second Claim, refers to, adopts, and incorporates each and all of the allegations contained in its First Claim as fully and completely as if the same were rewritten herein, and further alleges as follows:

(12) On or about September 16, 1960, defendants served plaintiff with a notice pursuant to Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156) of their desire to abrogate

Amendments to Complaint

the Mediation Agreement of May 17, 1950, and the similar agreement of January 10, 1946 between plaintiff and the last-named defendant, under the terms of which defendants had agreed that a fireman (helper), taken from the seniority ranks of the firemen's craft, would be employed on all locomotives operated by the defendants (with exceptions not here relevant). The said Section 6 notice contained the following specific proposals:

- "A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, which require the employment or use of a fireman (helper) on other than steam power in any class of service.
- "B. Establish a rule to provide that Management shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in any class of service.
- "C. The foregoing will be made applicable only through the process of attrition, i.e., through death, retirement, resignation or discharge. Men now holding seniority as fireman and/or engineer will continue to have all rights they have under the present Agreements, but hereafter Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever."

(13) On or about October 10, 1960, a conference was held between representatives of the plaintiff and representatives of the defendants on defendants' Section 6 notice, at which time defendants were informed that plaintiff was opposed to the abrogation of the said agreements. No

Amendments to Complaint

agreement was reached. Said conference was concluded by both parties agreeing that future conferences would be held on the subject of the Section 6 notice, but notwithstanding said conference and agreement to confer further, defendants proceeded to disregard the Agreement of May 17, 1950, and the agreement of January 10, 1946, by thereafter repeatedly and persistently operating many of its locomotives without a fireman (helper), taken from the seniority ranks of the firemen's craft, being employed as a member of the crew.

(14) On or about May 29, 1962, defendants invoked the services of the National Mediation Board to mediate the dispute over the defendants' Section 6 notice, and said dispute was docketed by the Board as NMB Docket No. A-6766. The Board undertook to mediate the dispute between August 21, 1962, and August 31, 1962, but without success, and on September 4, 1962, the Board announced to the parties that mediation was being recessed while the Board further considered the dispute. The Board's jurisdiction over the dispute continued and was in effect at the time the complaint was filed in the instant suit and is still in effect.

(15) Subsequent to the service by the defendants of their Section 6 notice on the plaintiff, and including the period during which the National Mediation Board has had jurisdiction of the dispute arising from the serving of the Section 6 notice, the defendants have changed the working conditions of their employees about which they were purporting to negotiate by repeatedly operating their locomotives without a fireman (helper), taken from the seniority ranks of the firemen's craft, being employed on said locomotives as a member of the crew, and by assigning employees

Amendments to Complaint

as though the rules and working conditions had been changed in accordance with the proposals contained in their section 6 notice, contrary to the requirements of Section 6 of the Railway Labor Act (45 U. S. C., Sec. 156) and of Section 5, First of said Act (45 U. S. C., Sec. 155, First).

Respectfully submitted,

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Answer to Amendments to Complaint
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Defendants for their Answer to plaintiff's "Amendments to Complaint" allege as follows:

First, with respect to the first paragraph of plaintiff's "Second Claim" defendants repeat, reiterate and re-allege the denials, averments and admissions contained in Paragraphs "1" through "24" of defendants' Amended Answer as if fully set forth herein.

Second, defendants deny each and every allegation contained in Paragraph "12", except admit that on September 16, 1960, defendants served plaintiff with a notice pursuant to Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156) the text of which is set forth in Paragraph "12". Defendants further allege that said notice was served to counter a notice of plaintiff served on defendants on or about September 7, 1960, and to clarify disputed portions of the contract in effect between the parties.

Third, defendants deny each and every allegation contained in Paragraph "13", except admit that on or about October 10, 1960, a conference was held between a representative of the plaintiff and representatives of the defendants concerning the aforesaid notices of plaintiff and defendants which conference was recessed without agreement being reached.

Answer to Amendments to Complaint

Fourth, defendants admit the allegations of Paragraph "14" and further allege that on August 14, 1962 the National Mediation Board, concurrently with the docketing of defendants' notice, docketed plaintiff's notice of September 7, 1960 as Docket No. 6754. Both the defendants' and the plaintiff's notices were mediated concurrently by the Board between August 21, 1962 and August 31, 1962, and are still pending before that body.

Fifth, defendants deny each and every allegation contained in Paragraph "15".

WHEREFORE these defendants pray that the Second Claim set forth in plaintiff's "Amendments to Complaint" be dismissed and that they be awarded the costs and disbursements of this action.

HAMILTON AND HAMILTON

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Transcript of Hearing
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Washington, D. C.
February 19, 1963

The above-entitled cause came on for hearing before
HON. LEONARD P. WALSH, *Judge*, at 10:00 o'clock a.m.,
February 19, 1963.

APPEARANCES:

For the Plaintiff:

MR. MILTON KRAMER, Esq.

and

MR. RUSSELL B. DAY, Esq.

For the Defendants:

MR. BURTON A. ZORN, Esq.

MR. THOMAS A. FLANNERY, Esq.

MR. LARRY M. LAVINSKY, Esq.

MR. SOL G. KRAMER, Esq.

PROCEEDINGS

Deputy Clerk: Civil Action 2881-62, Brotherhood of
Locomotive Firemen and Enginemen, vs. Southern Railway
Company, Cincinnati, New Orleans & Texas Railway Com-

Proceedings

pany, Alabama Great Southern Railroad Company, New Orleans & North Eastern Railroad Company, New Orleans Terminal Company, Georgia Southern & Florida Railway Company, St. Johns River Terminal Company and Carolina & Northwestern Railway Company.

Counsel for Plaintiff ready?

Mr. Kramer: The Plaintiff is ready.

Mr. Zorn: Defendants are ready.

The Court: All right, gentlemen.

Mr. Flannery: May we have a rule on the witnesses?

Deputy Clerk: Will the witnesses please retire to the witness room as designated by the Marshal? All witnesses.

(The witnesses were excluded from the Court room.)

Mr. Kramer: Your Honor, one of our witnesses is president of the Plaintiff. Is he included in the rule?

The Court: Well, the difficulty will be, I presume that it will apply also to the defendants, will it not?

Mr. Flannery: Yes.

All right, very well.

Mr. Kramer: May it please the Court, as a preliminary

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matter, subpoenas have been served upon a vice president of the plaintiff, Mr. Lampley to produce certain documents. Now he is here. He has had none of these documents. He has had nothing to do with this case and knows nothing about it. I wonder if he may be excused in view of this fact.

Mr. Zorn: Your Honor please, before we had notice from Mr. Kramer with respect to his decision with regard to the production of the documents we had requested, we had subpoenaed Mr. Lampley. Mr. Kramer, however, has been quite cooperative and has produced a large part of the papers we have requested. So I see no need for holding Mr. Lampley any further under the subpoena.

Opening Statement for Plaintiff

The Court: Very well, he will be excused.

Mr. Kramer: Your Honor, I assume we do not need an extensive opening statement since we have been before your Honor on a number of occasions. I would just like to outline what I think are the issues in this case and what are not the issues in this case. As you know, there is in effect an agreement of 1950 which provides that the defendants shall—employ a fireman or helper, taken from the seniority ranks of the Firemen on all locomotives with some irrelevant exceptions.

As the testimony will show, that arrangement goes back some time prior to 1950 and is a long established working condition of the operating crafts on the Southern Railroad,

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as well as other railroads.

Beginning with two and a half, or three years ago the Southern departed from their practice of employing a fireman taken from the seniority ranks of the firemen on locomotives.

Now, to be sure, under our contentions that is a breach of the contract. But we are not here seeking a remedy for breach of contract. We are not asking for damages or specific performance. What we are seeking in this case is a vindication of our statutory rights and of the public interest, provided for in the Railway Labor Act. If the carrier had simply violated the agreement here and there, we would have the ordinary breach of contract for which a contract remedy would be appropriate. But here we have a different situation. Here the defendant or the defendants blatantly announced that henceforth they consider themselves under no obligation to employ a fireman taken from the seniority ranks of the firemen on locomotives.

Now, we submit that that is a violation of the Railway Labor Act in two different and independent respects and

Opening Statement for Plaintiff

that we press these issues. Does their unilateral determination that henceforth they will not assign a fireman to all locomotives constitute a change in working conditions brought about other than through the procedures of the Railway Labor Act? If that is a change in working condi-

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tions or rules, other than as provided in the Railway Labor Act, then it is a violation of Section Two, Seventh of the Railway Labor Act which provides that a carrier shall not change rates of pay, rules or working conditions except through the procedures of the Railway Labor Act and the procedures of the Railway Labor Act have not been followed to make that change in rules or working conditions.

It is our position that their conduct constitutes also a violation of Section 6th and Section Five First of the Railway Labor Act, because the defendants have served a notice pursuant to Section 6th that they desire to change existing agreements so as to eliminate the requirement of employing a fireman on all locomotives. They served that notice. Negotiations produced nothing and they invoked mediation. They invoked the services of the National Mediation Board.

That is where the matter is still pending. They conducted some investigation and then recessed them. We allege, and they admit in their answer that that matter is now still pending before the National Mediation Board.

Now, Section Five First of the Railway Labor Act provides that either party to a dispute may invoke mediation, and then they specify what shall follow thereafter, that is, the Mediation Board shall attempt to mediate and if it con-

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cludes that it can not bring about an agreement through mediation, it shall then proffer arbitration and if either

Opening Statement for Plaintiff

party rejects arbitration, that is the end of it. But then it provides in the last paragraph of Section Five Sixth, "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed."

Now, we come to the critical language: "And for thirty days thereafter, unless in the intervening period, the parties agreed to arbitration or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose."

Now, it was both a rule and a working condition, and beyond any possibility of dispute, an established practice to employ a fireman on all locomotives prior to the time the dispute arose. So, under this provision when they have served this 6th notice which gave rise to the dispute and when they engage in the practice of not having a fireman, they have departed from this express command that they must maintain the conditions out of which the dispute arose until thirty days then after the rejection of arbitration.

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We have not yet reached a stage where arbitration has even been proffered, nor where mediation has been terminated. That is the second violation of the Railway Labor Act.

Now, Section 6th has a similar provision. They have served the Section Sixth Notice which is still pending in mediation. Section 6th provides for the parties making arrangements to meet and conferring and so forth, and then it says near the end, "Rates of Pay, Rules or Working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section Five of this Act."

Opening Statement for Defendants

That is the provision I just read. Then it has an exception: "Unless ten days has elapsed without a request for mediation."

But we have had that request for mediation so the exceptions do not apply.

It is our position, therefore, that they are violating three different provisions of the Railway Labor Act. The question here is, have they in effect repudiated the contract, or indeed, by simply changing an established practice, violated Section Seventh, Five First or Section Sixth?

Now, those are the issues in this case. There is not an issue in this case over the merits of their Section Sixth notice, or the merits of our Section Sixth notice which pre-

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ceded it. There is not in issue the question as to whether the present agreement is a good one, a bad one or indifferent. There is not in issue any question about whether the agreement should or should not be changed, and if any evidence is going to be offered about whether these agreements should or should not be changed, we will have to object and if such evidence is admitted, we will have to counter with evidence to contradict that, and I am afraid we will have a very long trial, but any such testimony would be simply irrelevant to the issue of whether, by repudiating the agreement and by changing an established practice, they have violated and are violating the Railway Labor Act in any one of the three respects to which I referred.

OPENING STATEMENT FOR DEFENDANTS

Mr. Zorn: If the Court please, since the argument on the preliminary, on the motion for preliminary injunction in this case, a number of things have happened in connection with companion cases. I think it would be extremely helpful to Your Honor if I tried, as briefly as I can, to get

Opening Statement for Defendants

the setting of this case and possibly the issues as we see them and not as the Plaintiff sees them.

No matter how many times the plaintiff may shift its legal position, as it has repeatedly done in this case and in the companion cases pending before this Court—the Plaintiff cannot escape from the basic and the only legal

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issue which constitutes the heart and core of this case—that is, the meaning, interpretation or construction of Section IV of the diesel agreement.

Does that agreement require defendants to hire new employees as firemen, as plaintiff has consistently contended for more than four years, or does it require that defendants employ and use on their locomotives only firemen who have acquired seniority status through service on defendant's lines?

For these past four years or more, plaintiff has continued to insist that Section IV must be construed in only one way—that it requires the hiring of new employees as firemen so that a fireman be available on every locomotive and that when no fireman is available, the scheduled train run must be annulled or canceled. During this same period of time, and up to the present moment defendants have insisted with equal vigor, that they will not hire new employees as firemen and that Section IV requires only the use of firemen who are available from the seniority ranks of plaintiff, including firemen on furlough.

This controversy over the respective contract rights and obligations of the parties and over their differences as to the meaning and interpretation of Section IV began in 1958, and became increasingly heated through subsequent

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years. As early as July of 1960 this basic contract dis-

Opening Statement for Defendants

pute had reached such a boiling point, that plaintiff issued a strike call and threatened to strike defendants in an effort to impose upon defendants by unlawful economic coercion, the plaintiff's interpretation of the meaning of the contract.

This is the same contract dispute which has continued over all these years and to this very day, with no change in the respective positions of the parties. Contrary to this undisputed historical record of plaintiff's position, plaintiff now and belatedly, seeks to inject into the case, charges of statutory violation and claims of improper implementation of a Section 6 Bargaining Notice.

A claim of statutory violation in the context of this four-year old dispute is meaningless. If, as we contend, the plain language of Section IV does not require the hiring of new firemen, then obviously there is no statutory violation. If, on the other hand, the language is ambiguous and requires the interpretation, this, under the controlling authorities must be done by the National Railroad Adjustment board. Only after such an interpretation could a determination be made as to any alleged violation of statute.

The language of Section IV of the diesel agreement by its very terms does not require the hiring of new employees as firemen.

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Section IV provides:

"A fireman, or a helper taken from the seniority ranks of the firemen, shall be employed on all locomotives"

Thus Section IV clearly and explicitly limits defendants' use of firemen to those "taken from the seniority ranks of the firemen."

Opening Statement for Defendants

This language can only refer to men who have worked as firemen on defendants' lines and thereby acquired seniority. Another portion of the agreement makes this abundantly clear. Article 26 (e) (1) provides:

"Firemen shall rank on the firemen's roster from the date of their first service as firemen * * *."

Manifestly, a man who has never before worked for defendants as a fireman, or stood for service as a fireman on defendants' lines, is not a fireman taken from plaintiff's seniority ranks as required by the plain language of Section IV.

But assuming arguendo, that this language is subject to any different interpretation and that evidence extraneous to the contract itself is required in order to arrive at its true meaning, then this court is faced with a question of contract construction which under the controlling

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authorities must be submitted to and decided by the National Railroad Adjustment Board.

In the face of the plain language of Section IV, Plaintiff at best can argue, as it has, that past practice, usage and custom support its interpretation.

In the memorandum which we submitted to your Honor last Friday, we reviewed in detail the controlling cases on this subject. We pointed out that in those cases as here unions had argued without success that:

1. Custom, practice and usage were overwhelmingly in favor of the Union's interpretation of the contract; and
2. That the railroad's position lacked bona fides and was patently without merit.

Opening Statement for Defendants

Despite such contentions which have been repeatedly pressed by unions before the courts they have been rejected and the courts have uniformly held that the jurisdiction of the National Railroad Adjustment Board to construe contracts is exclusive.

Plaintiff has urged here that the National Railroad Adjustment Board does not have jurisdiction because this dispute goes to the heart of the craft, will determine future rights, and does not involve a money claim or a claim by an individual. The cases and NRAB determinations cited in our memorandum which we submitted last Friday make

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it perfectly plain that plaintiff's arguments are completely without merit.

The Adjustment Board has exclusive jurisdiction to determine matters of contract construction and interpretation regardless of how important that determination may be or what future effect it may have on the rights of the respective parties. Furthermore the railway Labor Act itself makes it perfectly plain that the jurisdiction of the Adjustment Board is not limited to the award of money damages.

In short, however plaintiff may try to escape the statutory arrangement of the Railway Labor Act, the cases make it clear beyond dispute that this controversy over contract interpretation and construction must be determined by the National Railroad Adjustment Board and not by this court.

Until such time then as the NRAB should construe Section IV of the diesel agreement, as requiring defendants to hire new employees as firemen, there can be utterly no basis for any claim of statutory violation of Section Two, Seventh, or of Section Six of the Railway Labor Act.

Opening Statement for Defendants

Section Two, Seventh, has no application whatever to disputes over construction of existing contracts. It provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its em-

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ployees, as a class as embodied agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

If the existing contract, as we contend, on its face does not require the hiring of new employees as firemen, there is obviously no change of working conditions embodied in such an agreement. If, on the other hand, Section IV of the Diesel Agreement be deemed ambiguous, then any claim of statutory violation must await an interpretation and construction of that provision by the NRAB. In short, plaintiff's claim of statutory violation presupposes that its interpretation of Section IV is the only possible interpretation. Under the plain language of Section IV that position is completely untenable.

By the same token, plaintiff's belated claim of violation of Section 6 is equally untenable. Section 6 deals exclusively with proposed or intended changes of existing agreement. It prohibits only those alterations of rules or working conditions which are new or are changes from those provided in existing agreements.

In its amended complaint served only as recently as February 12, plaintiff has added a new cause of action consisting of a claim that defendants have unilaterally and improperly implemented a Section 6 notice served by them on September 16, 1960. It is significant that no such claim

Opening Statement for Defendants

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was ever heretofore made during the long four-year history of this dispute. It was raised for the very first time by plaintiff's counsel in the argument on the motion for a preliminary injunction on November 27, 1962. The injection of this new theory has apparently led to some confusion with respect to the importance given to certain of the chronological events in the history of this dispute. Such confusion is readily dispelled by reference to the following facts:

First, it is undisputed that plaintiff's strike call and strike threat of July, 1960 preceded and therefore could not have been related in any way to defendants' Section 6 notice which was served in September of 1960.

Second, it is conceded that the July, 1960 threatened strike was in protest over defendants' alleged violation of Section IV of the diesel agreement, the contractual controversy which had existed since 1958—not over defendants' section 6 notice served months later in September 1960.

Third, on September 7, 1960 with the contractual controversy still at fever heat, plaintiff served a Section 6 proposal with respect to consist of crews, which would in effect have written into a new contract plaintiff's interpretation of Section IV of the existing agreement regard-

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ing the employment of new firemen.

Fourth, on September 16, 1960 as a rebuttal to this Section 6 notice of plaintiff, defendants served a section 6 counter proposal, which in effect would have written into a new contract the defendants' interpretation of Section IV of the existing agreement.

Opening Statement for Defendants

Fifth, it was not until August of 1962 after defendants had invoked the mediation services of the Board for this purpose, that the National Mediation Board docketed both Section 6 notices for mediation. That mediation is still pending.

But between the strike threat of July, 1960 through August of 1962, and until November of 1962 when the argument was made for the first time Plaintiff had never claimed that Southern's refusal to hire new employees as firemen was anything other than a contract violation or a contract dispute. Just as plaintiff's argument of violation of Section Two, Seventh, must fall because this is and has always been a dispute over the construction of an existing contract, the newly injection Section 6 argument falls for the same reason. For, if our construction of Section IV of the diesel agreement is the proper construction, then Section 6 of the Railway Labor Act has no application. Section 6 deals exclusively with "intended" changes of existing agreements, i.e., proposals for new or different

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rules or working conditions than those contained in the provisions of existing agreements.

If defendants are correct in their interpretation that Section IV of the existing agreement does not require the hiring of new employees as firemen, then obviously by refusing to hire such new employees, they are not making any changes of working conditions to implement their Section 6 notice of September, 1960.

On the other hand, if the defendants are wrong as to their interpretation, despite the clear language of Section IV of the diesel agreement, limiting that obligation to seniority employees, then it is only the NRAB which, under the Railway Labor Act, can make this determination. Here

Opening Statement for Defendants

again, plaintiff is proceeding as though its interpretation of the contract is the only one possible, despite the contract's plain language to the contrary.

To conclude, we believe that the testimony will make the following points clear:

1. This has always been, from 1958 to the present, a controversy over the construction or interpretation of an existing contract, and nothing else.

2. This dispute never involved the implementation
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of any Section 6 proposal or any change of working conditions in violation of the Railway Labor Act.

3. Plaintiff, the evidence will show, has slept on its rights by failing to submit the basic issue of contract construction to the NRAB, which it could have done as far back as 1958.

Moreover, it has called and threatened two clearly unlawful strikes and thus comes into this Court with unclean hands. It called a strike in July of 1960 and another one in January of 1963, so we submit in a court of equity they have come in with unclean hands.

Now, throughout this case and the earlier arguments the plaintiff, in an effort to appeal to the sympathies of this Court, has argued that a resolution of this controversy before the Adjustment Board might take anywhere from six to eight years more.

The answer to that claim is twofold: First, as we have shown in our memorandum which we submitted last Friday, the argument of undue delay and hardship has time and again been made to and rejected by the Courts, including U. S. Supreme Court.

Opening Statement for Defendants

Secondly, the plaintiff in this case, is in a far more favorable position than the unions involved in these other cases.

We quote in our memorandum, as you recall, specific

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references to the precise arguments which were made in some of the cases on which the Court, the Supreme Court has ruled. This argument of delay has been made time and again and rejected.

There is another answer to that contention of delay and a much more practical answer because we say that the plaintiff in this case is in a far more favorable position than any of the unions involved in the cases in which the courts have repeatedly decided that matters of contract construction are for the Adjustment Board.

As we have earlier pointed out to your Honor, the underlying question which must eventually be resolved is the issue of the defendants' future obligation to hire new employees as firemen. This is precisely the issue which is now pending before the National Mediation Board in the Mediation Proceedings which were begun in August of 1962 and, as a result of the filing of the plaintiff's Section 6 notice, and our Section 6 notice.

Now, regardless of any past differences as to the meaning and construction of the present contract, these mediation proceedings afford both parties effectively to dispose of their disagreements for the future. If the Plaintiff is genuinely concerned that its firemen's craft will be destroyed, there is a very expeditious proceeding available to protect them against that.

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Under the Railway Labor Act, the Plaintiff, if it chose, could insist upon, as it has never heretofore done, expedi-

Opening Statement for Defendants

tious handling by the National Mediation Board of the pending mediation proposals with respect to the two Section 6 notices, and it is entirely within the power of the Plaintiff to progress these mediation proceedings to the point where the Board will be required, as Mr. Kramer pointed out, to proffer arbitration to the parties. If either party should reject such proffered arbitration, plaintiff would then be free lawfully to strike the defendants in order to obtain a new contract which clearly and unequivocally protects its interests.

If, as a result of such strike or threatened strike, the President of the United States appointed an Emergency Board, such a Board would afford the parties another tribunal for the resolution of their basic disagreement. However, if no agreement were reached either before or after the recommendations of such an emergency board, the plaintiff would within sixty days after the appointment of such a board, be free again to engage in a lawful strike, in an effort to obtain its objectives. All of these procedures could be completed within a matter of months, not years.

Indeed, as your Honor is aware, all of these could be

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accomplished in a matter of months, and not years and these mediation proceedings with respect to the Section 6 notices have been sitting before the Mediation Board since August of 1962 and, as a matter of fact, could have been processed long before then, because they were served and exchanged in fact in September, 1960.

Indeed the defendants have already through counsel offered the most expeditious and fairest method for the resolution of the underlying basic question: Namely, an agreement to have this issue for the future decided and determined finally by an Arbitration Board, an impartial one

Colloquy

appointed by the President of the United States. Such an arbitration could be completed in a short time, and we are willing to agree to that.

The decision of such a board would necessarily be final and binding on both parties and would adjudicate the problem with respect to whether or not the new contract between the parties should be written in such a way that there was no mistake or no question about what the obligations of each party were with respect to the issue of the hiring of new firemen.

As Your Honor well knows, this proposal which we thought fair and which would have resolved all of the

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claims of undue hardship or delay was flatly rejected by the plaintiff. In short, then, after doing absolutely nothing for four years, to submit its contractual dispute to the Adjustment Board, or to progress it section 6 notice through the National Mediation Board, through the procedures of the Act, the plaintiff, we think, is hardly in a position to shed any tears before this Court over any future delays inherent in the use of the Adjustment Board procedures, procedures which we say and which the cases clearly say are the only ones available for the disposition of this controversy.

Thank you.

The Court: Now, Mr. Zorn, this matter, this matter comes before the Court of course, on the original preliminary injunction which was denied.

Mr. Zorn: Yes, that is right.

The Court: The Court then wrote a memorandum opinion stating that there was no immediate irreparable injury that the Court could see, that the matter would be set down for hearing on the injunction.

Colloquy

Mr. Zorn: Oh, yes, your Honor.

The Court: So that we are presently before the Court on the advisability of issuing or rejecting an injunctive proceeding.

Mr. Zorn: Your Honor please, I did not understand

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that that was your intended purpose. I understood certainly what you say is entirely correct. But I understood further, your Honor, that if there were a full hearing on the merits, in which there is no opportunity of course in connection with an argument of the motion, the fact and position of the parties and admission against interest and many matters could be introduced in this case which we are certain would clarify your own thinking which you had only on the basis of paper, and we had assumed in this case.

We request, your Honor, that we do have a hearing on the merits here, so that your Honor has all of the facts of the case which I do not think you have in your preliminary injunction motion.

The Court: Well, now, the Court understands from your recitation that, in May of 1950, as the Court recalls, the parties hereto entered into the agreement referred to as the "diesel agreement."

Mr. Zorn: That is correct.

The Court: Section 4 is the disputed agreement in question.

Mr. Zorn: Yes.

The Court: Then in 1958 or thereabouts, the Court understands that it is your position that this interpretation

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changed.

Colloquy

Mr. Zorn: It is our position, your Honor, so that we get the record very straight on that, that so far as that contract is concerned, its language is clear and unambiguous and does not require us to hire new employees as firemen. What may have been the practice, and certainly the practice will have varied over a period of time. I think one of the reasons that you concluded as you did in connection with the decision on the preliminary motion is that you accepted as one of the factors in your decision the proposition that earlier practice—I think you had said about ten years—had been otherwise, and we changed.

We say two things: First, if a contract is as plain as this one is, practice is completely irrelevant and we are free to take a position on the contract as the language intends.

Secondly, and more importantly for this hearing or trial, we say that any extraneous evidence apart from the actual language of the contract has been held repeatedly to be beyond the powers of the Court to construe, and this has been done by the Courts.

The Court: All right. Now, the Court understands that position. Mr. Zorn, the Court is very desirous of having clarified this matter for the Court: That the National Railroad Adjustment Board has exclusive jurisdiction over

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certain matters referred to in the Railway Act itself.

Mr. Zorn: Yes.

The Court: And you contend that this particular matter belongs in that category.

Mr. Zorn: We do, and has belonged there all through the history of this dispute.

The Court: Further, under Section 6, on mediation, your interpretation of Section IV of the agreement should be

Colloquy

the correct interpretation of the agreement and, therefore, the Mediation Board should mediate the matter in accordance with your interpretation.

Mr. Zorn: Not quite. May I explain that? That is not quite our position. Our position is, first, that on the face of the language of the agreement, we have the right not to hire new firemen.

Second, that even if the agreement and ambiguous and extraneous evidence were introduced otherwise, this is a matter not to be gone into by the Court.

With respect to the National Mediation Board, I would like to make this very clear. The National Mediation Board has before it now not this problem of construing this contract, this Section. The National Mediation Board under the procedures of the Act has had, since 1962, before it the

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plaintiff's notice of a change of the contract and our notice to clarify and write a new contract. What the Mediation Board is doing is dealing with a new contract.

The Court: But it still goes to Section IV.

Mr. Zorn: Yes.

The Court: The Diesel Agreement.

Mr. Zorn: Yes, both.

The Court: That is the subject matter before the National Railroad Adjustment Board and before the Mediation Board is the same subject, approached from two different angles.

Mr. Zorn: One deals with the rights and obligations under the existing contract, that is, the National Railroad Adjustment Board.

The other is what should be the terms of a new contract which the parties shall enter into. That is the purpose of Section 6.

Colloquy

The Court: Now, the important factor to the Court is, does not the Railway Act, itself, expressly state that the position of the parties will remain in the status quo condition during the period that the matter is before the National Railroad Adjustment Board or the Mediation Board?

Mr. Zorn: Well, there are several sections which we have

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discussed, your Honor.

Section two, Seventh says that a carrier or a union shall not be free to change working conditions which are embodied in an existing agreement.

The Court: Well, you do not get my point yet. This hearing pertains to whether or not injunctive proceedings are justified.

Secondly, predicated on that determination, what conditions, if an injunction should be issued, because you readily agree, do you not, that this Court has the authority, even though the National Railroad Adjustment Board has exclusive jurisdiction, or whether the Mediation Board has the matter before it, that there is an obligation on this Court, in the event of the issuance of an injunction, to set conditions of that injunction?

Mr. Zorn: Is your Honor now referring to the companion case or to this case?

The Court: No, to this case.

Mr. Zorn: To this case?

The Court: Yes, to Section IV of the agreement entered into between the respective parties in 1950.

Mr. Zorn: Well, our position is clear regarding that. We say that this court, under the controlling authorities,

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is without authority in the first instance, to determine the

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contract construction. I think the cases are abundantly clear on that.

The Court: All right.

Mr. Zorn: We say, further, so far as the issue in this case is concerned, the complaint for four years has been consistent. They claim other types which I will not go into. They claim other types of violations; that a basic violation of Section IV, beginning as far back as 1958 when the practice of not hiring new employees as firemen was challenged by the plaintiff. We say that throughout that controversy, throughout that entire period and long before any Section 6 notice was ever served with the Mediation Board, both parties, we had taken a flat position we were not required to hire new firemen under the contract. They had said we were and that was the basic contract dispute.

So, we say further that with respect to this Court, if the events or the allegations with respect to changes of conditions which might somehow constitute a violation of the Act are changes of condition which can be clearly said to be wholly removed from an existing agreement, an entirely different one.

But that is not the case before you, your Honor. The

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case before you is a very simple case of whether or not we have made changes in violation of the provisions of our existing agreement. You can arrive at a violation of any of the sections of the Railway Labor Act only if you find that we have made unilateral changes in violation of the obligations of our existing agreement, and the answer to that—and we come back, the answer to that, is, unless the existing agreement is so patently violated that we have made the change—and that cannot be decided, the

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issue of violation, the issue of obligation, we say repeatedly, cannot be decided in this Court.

That issue can be decided in the first instance only by the Railroad Adjustment Board. That is what all of these cases say—every one of them. But fundamentally, to answer your question very directly now, there can be no violation of any section of the Railway Labor Act as distinguished from a contract dispute, unless and until that is found by somebody that we have breached an existing obligation under our existing contract on our refusal to hire new firemen. That you can dispose of on the very face of it. But, if there is any doubt, then evidence before this Court, as we pointed out with respect to custom and usage and practice is not before this Court. So that is where I think I have made myself clear.

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Mr. Kramer: I would like a short reply.

Mr. Zorn has stated that we have constantly shifted our position. Now, I do not know that we have. I submit that we have not.

When I first appeared in this Court on behalf of our request for a preliminary injunction, we took the position that Section 5 and Sixth were being violated. He refers to that as a belated claim of a violation. The first time we argued, we made it.

Now, I did point out then that it was not until that morning that I knew about the Section 6 notice. This is not something belated. As soon as we were here we relied on that.

Now, with respect to the diesel agreement, itself, I would like to point out first that the present diesel agreement was a 1950 agreement, but that was not brand new. That was preceded by an agreement in 1944 which had the iden-

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tical language to which the Southern Railway was a party, and that was preceded by the agreement of 1937 which had about the same identical language in which the Southern was not a party.

But, in 1934 it was a regional agreement to which the Southern was a party. It had the identical language.

Now, Mr. Zorn believes that a strong offense is a best defense, because he stands up here and says that a pro-

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vision that a fireman shall be employed on all locomotives, and he shall be taken from the seniority ranks of the firemen, means that a fireman shall be employed on locomotives if there is one available in the seniority ranks of the firemen. Now, he says that is what that plainly means. I do not think I have ever heard a more brash argument. It very plainly says a fireman shall be employed on all locomotives and he shall be taken from the seniority ranks of the firemen.

Now, he says that their Section 6 notice was intended to clarify. This is a belated thought on their part. They say that was not an attempt to change the agreements, it was an attempt to clarify the agreement.

Well, when the evidence is in and you see their Section 6 notice which says that hereafter the Southern shall have no obligation to have sufficient firemen. It does not say the contract means that now. It says hereafter, we shall not have that obligation and Mr. Zorn stands up here and tells you that when the Southern serves a notice saying hereafter we shall not have the obligation, what he means was that we have never had it.

Now, he referred also—well, I must point out also when he talks about going to the Adjustment Board, all I can do is repeat myself. We are not here seeking a vindi-

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cation of the contract. We are now here seeking a remedy for breach of contract. We are here to vindicate our right

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and the public interest in not having the Railway Labor Act violated by their changing working conditions or rules in any manner other than as provided in the Act.

Now, he refers to two clearly unlawful strikes. Now, I do not know who declared them unlawful. No court has declared either of them unlawful, and only Mr. Zorn has declared the second one to be unlawful.

With respect to the first one, not even the Southern ever contended it was unlawful. I do not know where he gets these two clearly unlawful strikes—the strikes never took place—but, as a result of which we come into court with “unclean hands.”

Until this morning I was wondering what that defense meant in his answer. One of his defenses, the 7th or 8th, says that we come into court with “unclean hands.” I thought was a display of a sense of humor. I just could not figure out what he meant by it until this morning. I see now that what he meant was that we have called two “clearly unlawful strikes,” one of which no one has ever contended was unlawful, and the other one which no one has ever adjudicated as unlawful.

Now, he says we have another remedy. A couple of weeks ago they offered to arbitrate and they were very reasonable and we would not take it.

Now, your Honor will recall that we offered to arbitrate,

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and they would not unless we arbitrated something else.

We offered to submit to a special court of adjustment as to whether it requires firemen on all locomotives and they said, oh, no, they would not take that to a special

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Board of Adjustment, but they would arbitrate that plus whether their Section 6 notice should be adopted.

Now, that, of course, we would not arbitrate. But there is not in this Court the question of whether the agreement should be changed but they would arbitrate the question that is before this Court, or one of the questions in the background of the question before this Court, only if we arbitrated something else.

Now, it is they, rather than we, who are derelict in pursuing an expeditious remedy. Your Honor will recall that last Friday we were given notice that unless we produced certain documents in Court, they would find themselves unable to properly cross examine and hinted, or perhaps threatened they would have to ask for a recess to issue the appropriate subpoenas.

I communicated that information to my clients, and, together with a list of the various descriptions they gave, and they came up with a lot of documents which we got yesterday.

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There were about seventy of them.

We also had about thirty more which some unreasonable people might think were included in those eight paragraphs. We wanted to avoid any question about producing everything they said they would need. So that was about 100, which we were to have in court today to enable them to cross examine. But then they said, "Oh, no, they needed more than that, they had to have them in advance."

So last night one of our vice presidents and two of Mr. Zorn's associates stayed up duplicating it and that took until about midnight, and they were given a copy of 100 documents, except one which we could not find but I have it now—(handing to Mr. Zorn).

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This is the one we could not find.

Mr. Zorn: Thank you very much.

Mr. Kramer: After we gave them those documents, they looked at them and said, "Oh, now we want some more." There is a reference in there to something "dated May 22 of one year to something else. We want that, too," they said. We did not have our files with us then and could not produce what they desired.

Mr. Jennings, our vice president, I do not know what time of the night this was, went through his files and he found that one and it is a pretty sizable document.

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So, I now deliver that, too.

Mr. Zorn: Thank you, Mr. Kramer.

Mr. Kramer: But, your Honor, sometime this must stop. The one thing we wanted, the one thing we got out of that week-long session of conferences, was a trial beginning today. I submit this trial should continue without interruption unless, of course, the Court cannot avoid interruption, but without interruption at the instigation of the defendants.

If they come up now with more documents which they need, which may be in Cleveland or Alabama, this trial must not stop. Somewhere there must come a halt to what they need.

He may look through that and discover he wants something else.

Your Honor, we are prepared to go forward with the trial.

The Court: That is not before the Court.

We will take a few minutes before we begin.

(A short recess was taken.)

Henry E. Gilbert—for Plaintiff—Direct

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Mr. Kramer: I would like to call Mr. Gilbert as my first witness.

The Court: Very well.

Thereupon HENRY E. GILBERT was called as a witness by and on behalf of the plaintiff, and, first being duly sworn, was examined, and testified as follows:

Direct Examination by Mr. Kramer:

Q. Will you state your full name? A. Henry E. Gilbert.

Q. What is your address? A. 318 Keith, K-e-i-t-h, Building, Cleveland, Ohio.

Q. Mr. Gilbert, what position do you hold? A. I am International President of the Brotherhood of Locomotive Firemen and Enginemen.

Q. How long have you held that office? A. Since September 1, 1953.

Q. Were you an officer of the Brotherhood prior thereto? A. Yes, sir.

Q. What office did you hold immediately before that? A. I was vice-president of the Brotherhood for six years.

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Q. And were you an officer of the Brotherhood prior to that? A. Yes, sir.

Q. How long have you held some official office in the Brotherhood? A. About 32 years.

Q. Mr. Gilbert, does your Brotherhood now have an agreement commonly called the Diesel Agreement? A. Yes, sir.

Q. To which the Southern Railway System is a party? A. We have.

Henry E. Gilbert—for Plaintiff—Direct

Q. Was that agreement entered into as the result of a Section 6 notice served by your organization? A. It was.

Q. When was that notice served? A. The one involving the Southern?

Q. Yes. A. That was back in 1941, I believe.

Q. No, the notice with respect to the current agreement.

A. Oh, well, that was in 1947. June the 30th, 1947.

Q. What did your Section 6 notice ask for with respect to the employment of firemen?

Mr. Zorn: If your Honor please, I would like to

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object, and at this point if you will bear with me, because I think this objection will run throughout the entire line of Mr. Kramer's inquiry:

We submit, sir, that anything outside the face of this contract is completely improper, immaterial and irrelevant; that the question of the history which led to the contract, the question of any practice in connection with the contract, has been held repeatedly by the courts to be matters which the courts, in the question of a situation of this kind, are forbidden from going into.

And if you will just bear with me, your Honor, and I won't repeat this again because I think that our memorandum submitted to your Honor last Friday makes this abundantly clear:

I point out to you, for example, that in the Pitney case, *Order of Railway Conductors against Pitney*, 326 U.S. 561, as we pointed out in our memorandum, the claim was made by the Organization, and in arguing that case before the Supreme Court that the Circuit had erred in failing to give consideration to

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established practice, and to interpretations which the parties themselves had given the rules over many years.

In the Supreme Court's opinion in that case, which

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is cited on page 7 of our memorandum, it makes it absolutely crystal-clear, your Honor, that any matter—that if a contract is to be interpreted or construed, that is a matter exclusively for the Adjustment Board, and that anything whatever to do with the history, custom, usage, practice, and any extraneous matters outside the face of the contract itself, are clearly not within the scope of the Courts to rule upon, and should be excluded.

I point out further and the language in the Pitney case is absolutely clear in that—I point out further that in the other cases cited—for example, in the very case in which one of the defendants was a party, where Southern Railway Company sought a declaratory judgment in a state court to determine whether conductors were or were not under their contract entitled to an extra day's pay for certain industrial switching.

The point was made in the case and evidence was taken before the court with respect to practice, and Southern contended that it had been accepted and agreed-upon practice since 1910, more than 40 years—more than 30 years before the case came up, and the established practice was not to pay an extra day's pay; nevertheless, the United States Supreme Court reversed against it, that these were matters

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which were not the interpretation of a contract, it

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is not for the court but for the Adjustment Board, and the court is not permitted to go into extraneous evidence with respect to history, background, practice, usage, or anything else.

And another case directly in point on that was Hilbert against Pennsylvania Railroad, where certiorari was denied, in 369 U.S. at 900, where the language was so clear against the carrier—not the kind of language we have here—the language was so clear against the carrier of the contract, it read, your Honor, “Established terminals will not be changed nor new terminals created except by agreement between the interested local chairman and the superintendent. Without any consultation the railroad moved a terminal which had been in existence for more than one hundred years.

On a motion for summary judgment the carrier took the position that the contract provision did not apply to this terminal.

In disposing of the case the court said that this is clearly a matter which must go to the National Railroad Adjustment Board and that the courts are completely precluded by the earlier decisions of the Supreme Court.

Even in a case where the language was crystal-clear against the carrier the court said, nevertheless,

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the court was without power or authority to go into the question of practice, custom, usage, history and the like.

So I say that running through this entire line of examination of this witness and other witnesses, that any effort here to introduce as evidence in this trial

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any factors dealing in connection with the construction of the contract or meaning of the contract is clearly improper in this case, and we submit that no evidence should be permitted in this case with respect to anything extraneous to the language of the contract itself and as to the contract itself, we say to your Honor, there, again, that that is a matter—and as you recall the MKT, the case which we called to your attention the last time we were together.

The MKT case plainly made it clear where the Supreme Court approved the district judge's finding below that he was wholly without authority to construe the contract to determine whether it had been violated or broken by the carrier.

So I say, your Honor, this is a major legal question in this proceeding. We say that we are under the cases completely right about it, and that any evidence here taken with respect to history, background, practice, custom, has uniformly been held by the courts to be outside the power of the court, except

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after a case has been determined by the National Railroad Adjustment Board. And we submit, your Honor, most respectfully, that under these decisions it would be reversible error to permit this sort of testimony in this case.

The Court: Well now, Mr. Zorn, isn't there a wide distinction between the law as it has been interpreted in the court hearing testimony on the merits, as against the court hearing testimony on the issuance of an injunction and conditions pertaining thereto?

Mr. Zorn: The only reference to that, your Honor, that I know of, is in the MKT case, and there, as I

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recall it—and I will have the language for you in a moment—both the court below and the Supreme Court—that was the case, your Honor, where the railroad was consolidating terminals; that is, it was changing the home, or away from home terminals, and actually eliminating existing jobs of two of five way-freight crews.

And as you recall, when the carrier sought an injunction against a threatened strike, the district court held that in view of the direct irreparable injury by the elimination of these jobs to these men, the court could properly apply a condition to the injunction sought by the railroad.

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The Court: Now, how would the court determine that? Unless it heard testimony?

Not regarding the merits; if the court determined that the matter was exclusively within the National Railroad Adjustment Board, but wouldn't the court have to hear the testimony pertaining to the interpretation to the practice?

Mr. Zorn: No; because we have completely the reverse situation here. We don't have that situation, and let me explain briefly why:

We have here a case in which the plaintiff, the Brotherhood, is seeking a mandatory injunction to compel us to hire new employees as firemen. That is their prayer for relief.

The Court: All right.

Mr. Zorn: And they say, sir—they say that the reason they are asking this court to issue such an injunction is because, if you read the original complaint and read the affidavits in support of the motion

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for the preliminary injunction, they are bound in charges of persistent and flagrant and deliberate violations by use of Section 4 of the Agreement.

Then to give the cake a little frosting they have added certain violations of the Railway Labor Act.

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Now we say, sir, that you don't even need to get anywhere near this problem of whether you should issue an injunction or not, because even at this stage of the case and on the pleadings alone you have a situation where you have before you what is obviously and must be obviously nothing but a question of contract construction.

Now, on that basis you could stop right there—you don't have to meet the question of the injunction at all.

If you should find, as I think you must, that the issue is essentially an issue "Did we have a contract", was a claim or violation made, did the union insist the contract, and did we take the position we were not required to hire firemen? It is at that very point, your Honor, that you could stop and say that "I am completely satisfied that here is a question of contract construction, of interpretation of a contract, and therefore I, the federal court, have no authority whatever to pass on that issue."

So you don't get anywhere near the issue of whether you should or shouldn't issue an injunction because you would then dismiss this case because that properly belongs with the National Adjustment Board.

That is my point, sir.

The Court: I realize your point; we have gone

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over it quite a few times.

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Mr. Zorn: Yes, sir.

The Court: The Court will overrule the objection.

Mr. Zorn: I respectfully except.

The Court: All right.

By Mr. Kramer:

Q. I believe, Mr. Gilbert, the last question was whether the 1950 Agreement was entered into as a result of the Section 6 Notice—oh, you did answer that? A. Yes.

Q. I then asked you with respect to the employment of firemen what that Section 6 notice asked for. A. Well, that Section 6 notice asked for the assignment of an additional fireman for each consist of four units—additional.

Q. Four units or less? A. Yes.

Q. What units? A. Diesel electric locomotive.

Q. Was that identical notice served on all the railroads of the country with which you had agreements? A. Yes, sir.

Q. About how many are there? A. Well, the total was approximately 160.

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Q. 160 railroads? A. Yes, sir.

Q. After following some of the procedures of the Railway Labor Act, did the President of the United States appoint an Emergency Board? A. He did.

Mr. Zorn: Excuse me, your Honor—I don't want to interrupt this any further, but probably I can save the Court's time if I am permitted a continuing line of objections to all of the testimony that relates in any way whatever to history, custom, usage, prac-

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tice, either on the Southern or other railroad, or anything extraneous to the contract itself.

The Court: All right. The Court will sustain the objection to the practice, custom, usage on all other railroads. We are concerned with a particular contract and that is the contract which is in evidence here, and the Court feels that the testimony should be confined to that.

Mr. Kramer: Well, up to a point, your Honor, I think that would be all right; but as the evidence will show, there were Diesel agreements with almost all the railroads in the country prior to the time that the Southern entered into a Diesel agreement; and the Diesel agreement into which the Southern entered adopted the language of the agreement there-

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tofore made with the other railroads, and I submit that they thereby adopted the interpretation of the agreement that had the same provisions with 100-and-some-odd other railroads.

The Court: All right. Let's proceed on the agreement that is before the Court.

By Mr. Kramer:

Q. I believe you stated that an Emergency Board was appointed, Mr. Gilbert? A. Yes, sir.

Q. Who were the members of that Board?

Mr. Zorn: That is objected to on your Honor's last ruling on the ground that this Emergency Board dealt with national railroads and was not addressed to Southern or to Southern alone.

Mr. Kramer: It included the Southern.

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The Court: All right.

Mr. Kramer: And it resulted in this agreement.

The Court: All right.

By Mr. Kramer:

Q. Who were the members of that Board, Mr. Gilbert?
A. Mr. George Taylor, Mr. Grady Lewis, and Mr. Osborne.

Q. Who were they? A. Well, Mr. Taylor is a man of
renown in the arbitration field, labor relations, has served

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in many capacities for the government and on many boards
dealing with labor matters, and I think is one of the out-
standing men in the country in that field. He is presently
with the Wharton School of Finance of the University of
Pennsylvania, and from that capacity serves in these other
fields that I have mentioned.

Q. How about the others? A. Well, they are well known,
maybe not as well known as Mr. Taylor, but are men of
national prominence in the field in which they operated in
this connection.

Q. You say "they are", Mr. Gilbert. But one of them is
dead, isn't he? A. Well yes, unfortunately.

Q. Did that Board issue a report to the President? A.
It did.

Q. Did it hold hearings after it was appointed? A. Yes,
it did.

Q. When was it appointed, do you know? A. Well, I
think it was in February of 1949.

Q. And when did they make their report to the Presi-
dent? A. Well, later that year—the exact date does not
come to me at the moment.

Q. Was it a matter of some six months or more? A.
Well, it was a number of months; yes, sir.

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Mr. Kramer: Your Honor, I have an authenticated copy, authenticated by the Secretary of the National Mediation Board, of that report which I would like to offer in evidence as our Exhibit Number 1.

I have some additional copies but unfortunately they are not all of the same print. Apparently it was reprinted.

The one I am offering in evidence is the one obtained from the National Mediation Board as a document in their custody.

That is where they are filed after the President is through with them.

The Court: All right. There is a running objection, of course, to all of this?

Mr. Zorn: That is correct.

Mr. Kramer: Yes.

The Court: Because the Court fails to see the relevancy of it. It speaks for itself.

Mr. Kramer: The report does, yes.

The Court: No; I say the agreement speaks for itself.

Mr. Kramer: Well, the report shows what the parties presented to it. It shows the considerations upon the basis of which they made their report. It shows the recommendations that it made upon the

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basis of which the parties entered into the agreement—the agreement here involved, the 1950 agreement—to which Southern is a party. And that agreement adopts some of the recommendations made by this Board.

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Now, this Board is a board appointed by the President pursuant to the Railway Labor Act, to investigate and report.

Now, the report shows it was in existence from February 15, 1949, until they made their report on September 19—a period of more than seven months that was devoted to formulating the basis upon which the present agreement was entered into.

Mr. Zorn: If your Honor please, Mr. Kramer in his statements has just pointed up for you, I think, as clearly as it is possible it could be pointed up, the basis of my objection.

It has made it very clear to you now that he is seeking to introduce this document, together with other documents and other questions, for the purpose of having your Honor construe this contract so that you can then hold that under the contract we have this obligation of hiring new employees, and without restating my objection, I submit that the question of construction is not and cannot be before this Court.

Mr. Kramer: There must be some measure of
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construction, your Honor, because—

The Court: There must be some measure of construction but the Court has already ruled, Mr. Kramer, that it is going to be confined to this agreement.

Mr. Kramer: Well, yes, but this was the basis of this agreement.

The Court: But the point is that this is analogous to a history of a statute that you are attempting to

Henry E. Gilbert—for Plaintiff—Direct

introduce where you claim that there is no ambiguity on the face of the document.

Now, you can't go into the history of a statute unless you claim that there is ambiguity.

Mr. Kramer: No; I claim that there is no ambiguity.

Mr. Zorn claims there is no ambiguity, but it means exactly the opposite.

The Court: Yes.

Mr. Kramer: I say there is no ambiguity, and this corroborates it. This shows that even if you think there is ambiguity that we are right. But I agree, there is no ambiguity.

The Court: All right.

Mr. Kramer: I say there is a repudiation.

The Court: All right; the objection on this will

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be sustained.

By Mr. Kramer:

Q. Was the Southern Railway System a party to those proceedings? A. They were.

Q. Mr. Gilbert, do you know who C. D. Mackay was, M-c-k-a-y? A. Yes, sir.

Q. Who was he?

Mr. Zorn: May I object, your Honor? Your Honor has just sustained an objection to the use of this report which Mr. Kramer sought to introduce in evidence.

He is now reading or examining the report with respect to getting the witness to testify, who appeared before the Board, who was there, and so on.

Henry E. Gilbert—for Plaintiff—Direct

I submit, your Honor, my objection would rule out these questions also.

Mr. Kramer: I simply asked him to identify who someone is. I am not reading from the report.

The Court: All right. You may proceed.

By Mr. Kramer:

Q. Who was Mr. D. D. McKay? A. He was the assistant vice president of the Southern Railway.

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Q. Assistant vice-president of what? A. The Southern Railway.

Q. Yes. But wasn't his title more than that? A. Well, that is the identification for him. He was in the personnel department.

Q. Who was Mr. F. A. Burroughs, Jr.? A. He was the Chief Personnel Officer of the Southern Railway.

Q. Did they participate in the negotiations that culminated in the 1950 agreement? A. They did.

Q. Mr. Gilbert, I show you a document marked "Mediation Agreement, Case A-3391", and ask you if that contains the current Diesel Agreement to which the Southern Railway is a party. A. Yes, sir.

Mr. Kramer: I offer that in evidence as Plaintiff's Exhibit Number 1.

(Plaintiff's Exhibit Number 1 was marked for identification.)

Mr. Zorn: On a very cursory examination of this document, if your Honor please, it goes much further than the description Mr. Kramer has just made

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of it. It is not only a Mediation agreement of May

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17, 1950, it includes, apparently, a set of principles agreed upon by representatives of the parties dated May 16, 1950, agreements with respect to arbitration on questions of violation, further agreements with respect—in other words, there are six separate items listed on the cover of this document, and I think this document clearly comes within the scope of your Honor's ruling that matters extraneous to Southern Railway should not be permitted in evidence.

Mr. Kramer: Nothing extraneous to Southern Railway about this; it is a party to the whole document.

The Court: The only thing that the Court is concerned with is the Diesel Agreement.

Mr. Kramer: Yes. At the same—

Mr. Zorn: Excuse me, your Honor. We have here, and have referred to this agreement from time, time after time, the current agreement with Section 4 which has been the subject of this action, which is contained in the agreement between the plaintiff and these defendants.

And what Mr. Kramer is seeking to do is to get in a series of documents dealing with the history, background, involving other parties, and many things completely irrelevant to the issue and extraneous to the agreement itself.

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We submit, your Honor, that this here is the agreement.

The Court: Are you objecting?

Mr. Zorn: I am objecting, sir.

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The Court: All right.

Mr. Zorn: And I object, of course, so that I won't have to take too much of your time, I object to everything along this line.

The Court: The objection will be sustained.

Mr. Kramer: Your Honor, I can't very well introduce documents which consist of the Diesel Agreement in effect without introducing documents to other railroads and parties because it is a joint agreement.

The Court: All right. Well, you can introduce that, but let's get to the Diesel Agreement.

Mr. Kramer: All right. Mr. Zorn has referred to this document. He says they have offered it many times.

The Court: That is right.

Mr. Kramer: It is not in the record. It was simply an appendix to an affidavit which was an appendix to their opposition to the preliminary injunction.

By Mr. Kramer:

Q. Mr. Gilbert, is this the current general agreement between the Brotherhood and the Southern Railway System and most of its subsidiaries? —57—
A. Yes, sir.

Q. I offer this in evidence.

Mr. Zorn: No objection.

The Court: All right. It will be received.

Mr. Kramer: I haven't had it marked yet.

The Court: All right.

The Clerk: Plaintiff's Exhibit Number 2, received in evidence.

Henry E. Gilbert—for Plaintiff—Direct

(Plaintiff's Exhibit Number 2 was marked for identification and received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, would you identify the page in there on which the Diesel Agreement begins? A. On page 150.

Q. Mr. Gilbert, when did the question of the true consist on Diesels first arise? A. Back in the early 1930s.

Mr. Kramer: So, as I understand your Honor's ruling, on a previous objection, you would sustain an objection with respect to testimony concerning an agreement with other railroads. And I was about

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to ask some questions on that.

So, for the purpose of saving time, I would like to state what I am offering to prove, if it is objected to, your Honor could make a ruling.

The Court: All right.

Mr. Kramer: I offer to prove that initially, some time in the middle 1930s, on two or three railroads, Diesels were first used. The problem of true consist was not then very important. Only a few railroads had a few diesels.

But then when they became more important, they entered into their first national Diesel agreement in 1937, to which the Southern was not a party.

I offer to prove that in that agreement—it was Section 3, I believe—there was a provision substantially identical to the language in the present agreement, and that under that agreement no one ever contended that a locomotive could be run without a fireman or helper taken from the seniority ranks of

Henry E. Gilbert—for Plaintiff—Direct

the firemen, and that it was recognized that as the result of that agreement, the railroads, other than the Southern, would be required then to employ 230 additional firemen, and that it was recognized that that was not the important gain, but the important gain was that in the future they would have to have a fireman on every locomotive and the craft would

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be preserved.

Mr. Zorn: Your Honor, we of course will object to that, and again, without restating all of the grounds of our objection, first that this is obviously history by analogy to legislative history which can be submitted only for one purpose and that is for the purpose of getting a construction of Section 4 of our current Diesel agreement from this Court.

Now, we say for all the other reasons we have already mentioned, that this is outside the scope of the jurisdiction of this Court.

It has a further affirmative course, as stated by Mr. Kramer himself, that it deals with history to which Southern Railroad was never a party.

Mr. Kramer: With respect to that, your Honor, as I said a little earlier, there was language pursuant to which both sides agreed that firemen had to be on every locomotive.

The next contract I am going to deal with is one to which Southern was a party, and it adopted the language of the 1937 agreement.

We are not dealing with an ordinary contract violation here. If we were just dealing here with a single instance of violation of contract, there might

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be some merit to some of Mr. Zorn's contentions. We are dealing here with repudiation.

This is not a series of isolated instances of violation. This is a—the Southern says they are not going to hire any more firemen and if there are none available they are going to run locomotives without firemen.

And I submit, your Honor, that when the Southern adopts language of an agreement that other parties entered into, then it must be considered to have adopted the meaning that the other parties gave to it.

The Court: The objection will be sustained.

By Mr. Kramer:

Q. Mr. Gilbert, when was a Section 6 notice served as a result of which your Organization entered into its first Diesel agreement with the Southern? A. In May of 1941.

Q. Now, what did you seek in that notice? A. Well, we sought the same agreement that we had on other railroads, for the Southern, and in addition we sought to have an additional fireman employed on each unit of the locomotive consist.

Q. Now, was that Section 6 notice served on all the rail-

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roads with which you had agreements? A. Yes, it was.

Q. Now, when was the dispute over that notice resolved? A. Well, in November of 1943 in certain territories, and in May of 1944 in the Southeastern, to which the Southern was a party.

Q. You entered into three regional agreements? A. Yes, sir.

Henry E. Gilbert—for Plaintiff—Direct

Q. And the Eastern and the Western were in 1943, did you say? A. Yes, sir.

Q. And the Southeastern in 1944? A. Yes, sir.

Q. And was the Southern party to the Southeastern agreement? A. It was.

Mr. Kramer: I ask you to mark this Plaintiff's 3.
The Clerk: Plaintiff's Exhibit 3 for identification.

(Plaintiff's Exhibit 3 was marked for identification.)

By Mr. Kramer:

Q. Mr. Gilbert, I show you a document marked Plaintiff's Exhibit 3 for identification and ask you if that is a copy of your 1944 agreement with the Southeastern Group

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including the Southern? A. Yes, it is.

Mr. Kramer: I offer that agreement in evidence, your Honor.

Mr. Zorn: Your Honor, that is objected to for all the reasons previously mentioned, and in addition it is not a current, but a prior agreement.

The Court: The objection on this will be overruled, and it will be received.

(Plaintiff's Exhibit 3 for identification was received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, will you read the first two lines of paragraph 3 of that agreement, including the punctuation? A.

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"A fireman, or a helper, taken from the seniority ranks of firemen, shall be employed on all locomotives; provided that the term 'locomotives' does not include any of the following:"

Q. Was that same language included in all three regional agreements? A. It was.

Q. Was that agreement in effect until superseded by the

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1950 agreement? A. Yes, sir.

Q. While that agreement was in effect, did the Southern ever contend that it wasn't required to employ a fireman on all locomotives? A. No, sir.

Mr. Zorn: Excuse me. I certainly object to the form of the question, and also we are now getting again into the question of history and practice, but the form of the question is entirely improper, and it has not been demonstrated that this witness could or would. But the basic objection still remains.

The Court: The objection will be overruled. The objection actually should be sustained on the form of the question, Mr. Kramer.

Mr. Kramer: Yes.

By Mr. Kramer:

Q. Mr. Gilbert, while that agreement was in effect, so far as you know, did any disputes arise over the failure to assign any firemen to a locomotive? A. No, sir.

Q. Did the Southern in fact assign someone taken from the seniority ranks of the firemen to all locomotives with

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the few exceptions listed in the agreements? A. They did.

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Mr. Zorn: Object to that. Here is a witness who obviously cannot possibly know the detail, and he is being asked very broad questions without a foundation having been laid as to whether he knew every day to day operation in the situation.

I submit the question is certainly improper in form.

The Court: The objection, Mr. Kramer, will be sustained as to the question in its form.

Mr. Kramer: Yes, sir.

The Court: Because the Court feels that the questions that you are asking are suggesting answers.

Mr. Kramer: All right.

By Mr. Kramer:

Q. Mr. Gilbert, is it the duty under the constitution of your Organization, or otherwise, of the General Chairman on a railroad to report to your office any violations or contended violations of your collective bargaining agreements?

A. Yes. That is customary, and particularly true of agreements which we construe to be national in scope as this one is.

Q. National or regional? A. Yes.

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Q. And do your general chairmen so report to your office? A. Yes, sir; when there are violations, they do.

Q. Or when they think there are violations? A. Yes.

Q. During the period that this agreement was in effect, did your general chairmen on the Southern report any violations of that provision of the agreement? A. We do not have any record of any.

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Mr. Kramer: Well, to save some time again, your Honor, I offer to prove that under the 1937 agreement and under the 1943 agreement which adopted the earlier language, all the other railroads of the country interpreted it as requiring the employment of a fireman on all locomotives, and that all the railroads of the country are now employing someone taken from the seniority ranks of the firemen, on all locomotives, and are jointly engaged in the movement that is now in effect seeking to change the current agreement to eliminate a requirement of employing a fireman on all locomotives.

This is all the railroads in the country that have an agreement containing the same language.

The Court: Well, the Court does not follow you, Mr. Kramer. The Court understood from your open-

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ing statement that you stated to the court that this court is without jurisdiction to entertain whether or not the contract in question was good or bad, was beneficial or detrimental.

Mr. Kramer: That is right.

The Court: That the sole question before the Court was the contract itself.

Mr. Kramer: The question before the Court is whether there is a repudiation of the contract.

The Court: Yes.

Mr. Kramer: Now it is my position—

The Court: Now, aren't you blowing hot and cold, that you want to introduce evidence on other railroads and what the practice is on other railroads, when you say to the Court the sole question that is before this Court is a contract that we entered into

Henry E. Gilbert—for Plaintiff—Direct

in 1950, and the conduct of the Southern Railway in respect to that contract?

Mr. Kramer: Yes; well, one of the questions before this Court is not whether there is a violation of the contract but whether there is a repudiation of the contract.

The Court: Yes.

Mr. Kramer: Now, if you have a contract to which the 160 railroads are parties—to the same contract they are joint parties—to the same contract, and

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159 of them read it one way and the Southern says, "That isn't what it means," then they are simply repudiating the contract, not interpreting it differently.

When all the other railroads including the Southern, from 1944 to 1959 read it the same way, and in 1959 the Southern says "I disagree with what the other 159 railroads give to this contract", that is a repudiation. And, therefore, that evidence would be relevant to whether the Southern has repudiated its agreement and therefore made a unilateral change in conditions.

The Court: Well, haven't the other railroads, though, now taken a different position?

Mr. Kramer: No. The other railroads, and the Southern—all of them—in 1959 served a notice to change.

The Court: No; but as of 1963, haven't the other railroads taken a different position?

Mr. Kramer: Not as to the meaning of the contract, no.

The Court: No; but as to the question of firemen.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Kramer: Well, they have not taken a different position as to what the contract means. They have taken the position, as has the Southern—

The Court: Aren't we going to go into a mass of
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testimony that would take months, that would not be relevant to our issue?

Mr. Kramer: No. If the evidence that I am offering was being offered to prove that the agreement was a good one or a bad one, or that it should not be changed, then what your Honor says would be correct.

But I am not offering it to show that the agreement is good or bad. I am just offering it to show what all the parties to it, but the Southern, think it means. Not whether it should be changed or should not be changed, but just what it means.

Mr. Zorn: May I have just a brief word, your Honor?

The Court: Yes.

Mr. Zorn: Because Mr. Kramer has repeatedly today, and on earlier arguments, sought to make some legal distinction between a violation of a contract and a repudiation of a contract.

Somehow or other—and I hope your Honor is not misled by that—he could argue that we weished on the contract, that we broke the contract, that we failed to observe the contract, that we violated the contract.

The mere fact that he uses a word “repudiation”
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can mean nothing other than his basic position here is that we have broken or violated the contract.

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And so I submit again that the issue before you, sought to be put before you by the plaintiff, necessarily involves your interpretation of this contract in order to determine whether we welshed, whether we reneged, whether we broke, whether we violated it, and I say to your Honor that all of this evidence, whether it applies to practice on the Southern, or whether it applies to railroads generally, might be evidence properly submitted to the Railroad Adjustment Board, but it is certainly completely improper to be admitted in this Court on a question of construction.

The Court: All right. The objection will be sustained.

Mr. Kramer: Along the same line, your Honor—and I assume there will be the same objection—I would prove that—well, I am premature.

By Mr. Kramer:

Q. Mr. Gilbert, who was your general chairman for the Southern? A. Mr. Ralph McCollum; M-c-C-o-l-l-u-m.

Q. Has Mr. McCollum reported to your office that the Southern in his opinion was not employing a fireman on all
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locomotives? A. Yes, sir, he has.

Q. When did he so report to your office? A. I think the earliest attention that was directed to us was in 1959.

Q. That was the earliest? A. Yes.

Mr. Zorn: Could we inquire whether the questions are directed to oral representations or statements, or written statements submitted, as Mr. Gilbert has

Henry E. Gilbert—for Plaintiff—Direct

indicated before, reports of general chairmen with respect to violations?

If they are written, I think we should see them.

The Court: All right.

By Mr. Kramer:

Q. Did he report to you orally or in writing? A. We have it both ways.

Q. At about the same time? A. Yes.

Q. After the 1950 agreement to which the Southern was a party was entered into, did the Southern thereafter serve a Section 6 notice on your Organization to revise that

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agreement? A. They did.

Q. When? A. On November 2, 1959.

Q. Did that same notice ask for the revision of many other agreements? I mean other provisions of your collective bargaining agreement as a whole. A. In some other.

Mr. Kramer: Would you mark this, please?

The Clerk: Plaintiff's Exhibit Number 4 for identification.

(Plaintiff's Exhibit Number 4 was marked for identification.)

By Mr. Kramer:

Q. Mr. Gilbert, I show you a page marked Plaintiff's Exhibit 4 for identification, and ask you if that is a copy of the portion of the Southern's Section notice of November 2, 1959, that pertained to the employment of firemen on other than steam power. A. Yes, sir.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Kramer: I offer Plaintiff's Exhibit 4 for identification in evidence.

Mr. Zorn: No objection.

The Court: All right. It will be received in evi-

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dence.

(Plaintiff's Exhibit 4 for identification was received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, was an identical notice served on your Organization by all the other railroads of the country with which you have collective bargaining agreements? A. Yes, sir.

Q. Did you or did your Organization serve on the Southern a counter-proposal to that Section 6 notice? A. They did.

The Court: We will take a recess at this time for lunch and we will report back at a quarter of 2:00, and that will give you an opportunity to be downstairs before the large crowd gets down there if you are going to eat in the building, because it is raining out today.

Mr. Kramer: Yes, sir. Thank you.

(Whereupon, at 12:15 p. m., the trial recessed, to resume at 1:45 p. m., of the same day.)

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AFTERNOON SESSION

1:45 p.m.

Thereupon HENRY E. GILBERT a witness, having been duly sworn, resumed his testimony further as follows:

Direct Examination:

Mr. Kramer: Your Honor, I am told the record will not be clear with respect to plaintiff's 1, which was offered in evidence and rejected.

Now, to make it clear, I would like to have it marked first for identification.

The Court: It will be so identified.

Deputy Clerk: Plaintiff's exhibit 1 for identification.

(Plaintiff's Exhibit No. 1 is marked for identification.)

Mr. Kramer: This is the report of Emergency Board No. 70 dated September 19, 1949, which preceded, or which considered the plaintiff's notice to revise the 1944 Diesel Agreement and which led to the Diesel Agreement of 1950 which is the agreement currently in effect, and I offer it in evidence.

The Court: The Court has already ruled on it.

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Mr. Kramer: Yes.

The objection was made, and your Honor has ruled it will be excluded.

The Court: Yes.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Kramer: Miss Reporter, would you read the last question?

The Court: Mr. Kramer, the Court's recollection of the last question would be pertaining to complaints received from Mr. McCunum, or let us start at that point anyhow.

Mr. Zorn: Off the record a moment.

(Discussion was off the record.)

Mr. Kramer: My recollection is that the last question pertained to the Brotherhood having been served with a notice dated November 2, 1959 by the Southern, which was in identical terms with the notice served on the plaintiff by all the other railroads with which it has collective bargaining agreements.

I then ask you, Mr. Gilbert, whether your organization thereafter served a Section 6 Counter proposal to the carriers' notice of November 2, 1959.

Direct Examination (continued):

The Witness: We did.

Mr. Kramer: Mark this, please.

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Deputy Clerk: Plaintiff's Exhibit 5 for identification.

(Plaintiff's Exhibit No. 5 was marked for identification.)

By Mr. Kramer:

Q. Mr. Gilbert, I show you a document consisting of two pages and ask you whether that is the counter proposal

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served by your organization on the defendant railroads?

A. That is right. It was served in conjunction with the other four transportation organizations.

Q. You mean all five of you served the same notice, right? A. Yes, sir.

Q. On all the railroads in the country? A. Yes, sir.

Q. What date? A. September 7, 1960.

Mr. Kramer: I offer plaintiff's exhibit 5 for identification into evidence.

Mr. Zorn: A basic objection is posed. But since there will be in evidence the Southern's response for that, for that purpose I will not object to this particular document.

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The Court: It will be received in evidence.

Deputy Clerk: Plaintiff's exhibit 5 received in evidence.

(Plaintiff's Exhibit No. 5 received in evidence.)

By Mr. Kramer:

Q. You said the other transportation Brotherhoods, will you name them? A. Brotherhood of Locomotive Engineers, the Order of Railway Conductors and Brakemen, Railroad Trainmen and the Switchmen's Union of North America.

Q. In addition to— A. In addition to the Brotherhood of Locomotive Firemen and Enginemen.

Q. Thereafter, did the Southern Railway or Railroads serve on your organization a counter proposal to your counter-proposal? A. Yes, sir.

Q. On what date was that? A. September 16.

Q. What year? A. 1960.

Henry E. Gilbert—for Plaintiff—Direct

Deputy Clerk: Plaintiff's Exhibit 6 for identification.

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(Plaintiff's Exhibit 6 marked for identification.)

By Mr. Kramer:

Q. Mr. Gilbert, I show you a document dated September 16, 1960 marked for identification as Plaintiff's exhibit 6 and ask you whether that is a copy of the counter proposal to your counter-proposal? A. Yes, sir.

Mr. Kramer: I offer Plaintiff's exhibit for identification No. 6 in evidence.

The Court: Any objection?

Mr. Zorn: No objection.

The Court: It will be received without objection.

(Plaintiff's exhibit 6 will be received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, did the September 16, 1960 notice of the Southern Railway differ in any material respect from the previous notice of November 2, 1959? A. Yes, sir.

Mr. Zorn: I object because I think the documents very clearly speak for themselves.

Mr. Kramer: The documents speak for themselves but to have a continuous coherent story.

The Court: The witness may answer.

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The Witness: Repeat the question then.

Henry E. Gilbert—for Plaintiff—Direct

By Mr. Kramer:

Q. I asked you whether it differed in any material respect from the earlier notice. A. Well, there were two differences.

Q. What were they? A. One was that they removed the passenger service from the exemptions contained in the November 2 notice. And they proposed attrition formula rather than a direct removal.

Q. Do I understand you correctly then that the earlier notice applied only to freight and yard service and the later one applied to all services? A. All services, yes, sir.

Q. Did the Southern—just a moment.

Mr. Gilbert, these last few documents we have introduced have pertained to all of the defendants in this case except the Carolina and Northwestern. Were the same notices served on each other with respect to the Carolina and Northwestern, also? A. Yes, sir.

Q. Did the carrier—did the Southern Railway System thereafter notify your organization which of the two notices it wanted to continue in effect? A. Not for some

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while. I think the first information I had that the November 2, 1959 notice had been withdrawn was on October 17, 1960.

(Plaintiff exhibit 7 marked for identification.)

By Mr. Kramer:

Q. Mr. Gilbert, I show you a copy of a letter on Southern Railway System letterhead dated Oct. 17, 1960 and I ask you further if that is the letter by which the Southern advised your organization that it withdrew its November 2, 1959 notice? A. Yes, it is.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Kramer: I offer plaintiff exhibit 7 for identification.

Mr. Zorn: No objection.

The Court: It will be received without objection.

(Plaintiff exhibit 7 received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, have any of the other railroads withdrawn their November 2nd, 1959 notice? A. No.

Q. That notice then with respect to the other railroads is still in effect and a matter under consideration? A. It
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is still pending, yes, sir.

Q. Mr. Gilbert, are any of the other railroads that served the November 2nd, 1959—

Mr. Zorn: Objection.

Mr. Kramer: Without a fireman taken from the seniority ranks of the firemen.

The Witness: No.

Mr. Zorn: There is an objection pending.

The Court: The objection runs all the way through the testimony anyhow.

Mr. Zorn: Yes, it does. This deals with the practice of the other railroads which is part of my basic objection.

Mr. Kramer: Are any of the other railroads that served the November 2nd, 1959 notice running locomotives without a fireman or helper taken from the seniority ranks of the firemen?

The Court: There is an objection to that. The objection is sustained.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Zorn: There is an earlier answer.

The Court: I realize that.

Mr. Zorn: I would for the record move to strike that answer in view of the ruling.

The Court: It will be stricken.

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By Mr. Kramer:

Q. After the Southern's counter proposal of September 16, 1960 was an agreement entered into— A. No.

Q. Were the services of the National Mediation Board invoked by either party? A. In connection with that notice?

Q. Yes. A. Yes, sir.

Q. Who invoked mediation? A. The Southern Railway.

Deputy Clerk: Plaintiff exhibit 8 marked for identification.

(Plaintiff exhibit 8 marked for identification.)

By Mr. Kramer:

Q. Were you notified by the National Mediation Board that the Southern had invoked their services with respect to September 16, 1960 notice? A. We were.

Q. I show you a letter marked for identification as plaintiff exhibit 8 dated May 31, 1962 or rather a copy of such a letter on the letterhead of the National Mediation Board and ask you if that is a copy of a letter addressed

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to you by the Secretary of that Board, advising you that the Southern had invoked mediatory services of that board? A. Yes, sir, it is.

Henry E. Gilbert—for Plaintiff—Direct

Mr. Kramer: I offer plaintiff exhibit 8 for identification in evidence.

Mr. Zorn: No objection.

The Court: Received.

(Plaintiff exhibit 8 is received in evidence.)

By Mr. Kramer:

Q. Mr. Gilbert, are those mediation proceedings still pending? A. Yes, sir, they are.

Q. Have you been advised by the National Mediation Board at any time that it had terminated its mediatory services with respect to that notice? A. We have not received such information.

Q. Did your general chairman on the Southern, Mr. McCullum, advise you that the Southern Railway system was disregarding in his opinion, disregarding the current diesel agreement?

Mr. Zorn: The very least objection I could make to that—

The Court: The objection is sustained.

Mr. Kramer: Your Honor, he testified to that

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this morning.

The Court: I realize that but Mr. Zorn feels the question is objectionable. You can ask him—

Mr. Kramer: I understand.

By Mr. Kramer:

Q. Have you received communications from your general chairman on the Southern concerning the application

Henry E. Gilbert—for Plaintiff—Direct

of the diesel agreement on that railroad system? A. Yes, sir, we received a large number of them.

Q. From whom? A. Our general chairman, Mr. McCullum.

Q. What did those communications say? A. It identified the manner in which the Southern Railroad is disregarding the application of that road.

Q. And when did such communications from your general chairman begin? A. Well, they began sometime in 1959.

Q. Have they continued since then? A. Yes, continuing up to and including the present.

Q. Did you assign the Grand Lodge Officer to assist your general chairman with respect to this matter? A. We have.

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Q. Who was that? A. The vice president currently assigned is Mr. J. W. Jennings.

Q. Have they reported to you with respect to their conferences with the Southern? A. Yes. The ones that they could get.

Q. Are you implying something there? You said "The ones they could get." A. Well, there was an endeavor made to meet with the carrier representative by Mr. Jennings. He was denied the opportunity to meet.

Q. What did you do when you received such information? A. I subsequently called the president of the railroad and advised him of the situation.

Mr. Zorn: Can we fix the time?

By Mr. Kramer:

Q. When was this conversation with the president? A. Well, my first approach, I could not reach him. Subse-

Henry E. Gilbert—for Plaintiff—Direct

quently he returned my call and it was sometime in December on or about the 6th or 7th, somewhere in there.

The Court: What year?

The Witness: 1962, sir.

The Court: 1962.

The Witness: Yes, sir.

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By Mr. Kramer:

Q. Mr. Gilbert, did you receive a letter from Mr. Brosnan with respect to your telephone conversation? A. Yes, I did.

Q. Do you have a copy of it? A. Yes.

Q. I show you a letter, a copy of a letter on the stationery of the Southern Railway System dated December 12, 1962 and ask you if that is a copy of the letter you received from Mr. Brosnan. A. It is.

Q. Who is he? A. President of Southern Railway.

Mr. Kramer: I did not mark it for identification.

The Court: Mr. Gilbert, was that pertaining to the telephone conversation that you had?

The Witness: Yes, it was.

Deputy Clerk: Plaintiff exhibit 9 for identification.

(Plaintiff exhibit 9 marked for identification.)

Mr. Kramer: I offer plaintiff exhibit 9 for identification in evidence.

Mr. Zorn: No objection.

The Court: It is received.

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(Plaintiff exhibit 9 received in evidence.)

Henry E. Gilbert—for Plaintiff—Cross

Mr. Kramer: You may cross examine.

Cross Examination by Mr. Zorn:

Q. Mr. Gilbert, you have testified, I believe, that not only your general chairman, Mr. McCullum, but vice presidents of your organization reported to you from time to time with respect to certain events on Southern Railway System, is that correct? A. That is correct, sir.

Q. I think you made it clear in one of your last answers that those reports, that is the combined reports of the general chairman as well as vice presidents who were assigned to this dispute, commenced some time in 1959 and continued right through until what period did you say?

A. We are currently receiving them. When I say "currently"—

Q. Up to the very present time. A. Yes, they are still continuing to come.

Q. Mr. Gilbert, I show you a document entitled "Chronology of events in connection with violation of vacation mileage limitation and diesel agreements between BLF&E and Southern Railway System, which commences with an

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item dated July 3, 1959 and concludes on page 19 of this document with an item under date of November 23, 1962. I ask you whether this paper or document comes from the files of your organization kept there in the regular course of business?

Mr. Kramer: Can I see it?

The Witness: I am sure, Mr. Zorn, that we have copies of this but it would not necessarily be that we would keep it up to date as the situations arose from day to day.

Henry E. Gilbert—for Plaintiff—Cross

By Mr. Zorn:

Q. My question is this: This document for your information, Mr. Gilbert, was produced by your counsel at our request. A. Yes, sir.

Q. As I understood it, was produced from the files of your organization, is that correct? Do you so understand it? A. Yes, in so far as the identity is concerned.

Q. Well, could you tell us, Mr. Gilbert, whether this is the kind of document you referred to in terms of referring to a record kept of complaints of various kinds by the general chairman with respect to a particular calendar kept by your office in Cleveland? A. No, not necessarily. We maintain our files by various identifications, and it would not necessarily be in this order, Mr. Zorn.

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Q. But there is no misunderstanding between us, is there, that this document comes out of the files of your office, that it refers to a series of events including many, many complaints with respect to the conduct of Southern Railway over a period of time and that this is a document which seeks to list not necessarily fully complete, a chronology of so-called items of violation by Southern Railway system and its constituent lines, is that correct? A. Well, you asked about any agreement about it. I am not sure what your idea is. But it represents matters that could be corroborated in our records.

Q. In other words, this is the chronology prepared within your office with respect to events which have occurred on Southern, involving your organization between the dates mentioned in this document, is that correct? A. Not necessarily in our office, Mr. Zorn, when we assign an officer to a case, we refer to them what we may have in our office in connection with it, and he may have prepared it.

Henry E. Gilbert—for Plaintiff—Cross

Q. Is there any question whatsoever that this particular document showing—this document I now show you, was prepared by an official of your organization in the regular course of business? A. No question about that.

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Q. No question about that? A. No.

Q. May I mark this for identification, which I should have done before.

Deputy Clerk: Defendant No. 1 for identification.

(Defendant exhibit 1 marked for identification.)

Mr. Zorn: I offer in evidence at this time defendant exhibit 1 for identification entitled "Chronology of Events in Connection with Violation of Vacation Mileage Limitation and Diesel Agreements between BLF&E and Southern Railway System."

The Court: Any objection?

Mr. Kramer: None.

The Court: Received.

(Defendant exhibit 1 received in evidence.)

(Defendant exhibit 2 marked for identification.)

By Mr. Zorn:

Q. I show you defendant exhibit 2 for identification, being a letter under date of Oct. 2, 1959 from Mr. Ralph L. McCullum, General Chairman, addressed to you at your office in Cleveland, and ask you whether you received

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that letter and are familiar with its contents. A. Yes.

Q. You are? A. Yes, sir.

Henry E. Gilbert—for Plaintiff—Cross

Mr. Zorn: I offer in evidence defendant exhibit 2 for identification as just described.

Mr. Kramer: No objection.

The Court: Received.

(Exhibit 2, Defendants received in evidence.)

Mr. Zorn: Your Honor please, I think it would be helpful to you if I read just some very brief extracts from some of these letters into the record, and I am now reading from the bottom of page 1 of defendant exhibit 2.

"Local Chairman Swan advised me this date that the situation is now fairly well in hand because vacations have been completed and sufficient men are available. However, in view of the fact that Mr. Tolleson advised me in conference that he did not intend to employ additional firemen on the Washington Division and he further stated that the organization had no right to make agreements when firemen were not available, it is evident we will have to take stern action to settle this matter."

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Just another sentence on the second page, next to the last paragraph in this letter from Mr. McCullum to Gilbert—

Mr. Kramer: I have to object to reading excerpts. Some of these things being read are being read out of context. I have no objection to Mr. Zorn reading the entire letter.

Mr. Zorn: Your Honor, the choice is simply this. We are introducing these letters for a very definite purpose, of course. I thought that it might be helpful

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to you to get parts as we were going along. We will use them in our briefs as we go along anyway.

The Court: This letter is included in defendant exhibit 1, that is the compilation of the entire chronological one.

The Witness: It is referred to, yes, your Honor.

The Court: It is referred to, you say?

The Witness: Yes.

Mr. Zorn: Yes, the item on the first page of defendant exhibit 1.

The Court: All right.

Mr. Kramer: I have objected to reading excerpts.

The Court: Sustained. I will read it.

Mr. Zorn: All right, sir.

Deputy Clerk: Defendant exhibit 3 for identification.

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(Defendant exhibit 3 marked for identification.)

By Mr. Zorn:

Q. I show you defendant exhibit 3 for identification, being a letter dated May 19, 1960, from Savannah, Georgia, addressed to you at your office in Cleveland, and signed W. E. Mitchell, Vice President. I would like to ask you first, Mr. Mitchell, whose signature appears here on, he is the vice president of your organization? A. Yes.

Q. At various times during this dispute with Southern, was he assigned by you to handle the dispute together with the General Chairman, Mr. McCullum? A. Yes, he has been one of the officers that was assigned.

Q. Did you receive this letter, and were you made to become familiar with its contents? A. Yes, sir.

Henry E. Gilbert—for Plaintiff—Cross

Mr. Zorn: I offer defendant exhibit 3 in evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

(Defendant exhibit 3 is received in evidence.)

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By Mr. Zorn:

Q. Mr. Gilbert, on the second page of this letter, defendant exhibit 3, there is a reference, is there not, from Mr. Mitchell to you with respect to agreement modifying the seniority provisions of the contract between your organization and Southern?

Mr. Kramer: I object to any testimony concerning a modification of the seniority provisions of the general collective bargaining agreement. They have no relevance in this case. I know Mr. Zorn has argued that it does. You may recall, your Honor, in our earlier discussions reference was made to an agreement entered into in 1960 which permitted a fireman to have seniority on more than one distance. Formerly, he could have seniority only on one distance. Now, what this has to do with this case is beyond my comprehension.

It is totally beyond any relevance. It is immaterial.

I object.

The Court: Overruled.

The Witness: You will have to ask the question again.

Mr. Zorn: All right.

Henry E. Gilbert—for Plaintiff—Cross

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By Mr. Zorn:

Q. Let me ask it of you this way. Without telling you to read this letter, Mr. Mitchell in the letter refers to meetings he has had together with McCullum and Mr. Tolleson of Southern for discussion of disputes between the parties. Then at the top of page 2 of this exhibit 3, he refers to an attached memorandum of agreement which was drafted providing for the establishment of seniority for furloughed firemen. I was going to ask you whether you later became—well, whether that attachment was enclosed in that letter and whether you were familiar with the memorandum of agreement with respect to seniority referred to in that letter? A. Well, I think for a clear understanding on this, we have to go back farther than this.

Q. I am asking only one question. Perhaps your counsel may want to bring that out. I am asking you simply whether you recall that there was attached to defendant exhibit 3 a memorandum of agreement dealing with seniority between your organization and Southern?

Mr. Kramer: Objection, your Honor. Mr. Zorn is mis-reading it. As I understand this page 2, they say that a memorandum understanding was drafted, not that it executed.

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The Court: I realize that. The question is, was there a memorandum attached, whether it was signed or not. Then the court understands that you want to make an explanation.

The Witness: Well, in its bare presentation here, it does not have all of the relevance that it should have.

Henry E. Gilbert—for Plaintiff—Cross

The Court: Well, can you answer the question, and then you can give any explanation or any enlargement that you care to?

The Witness: We have always advocated that furloughed men be given preference to hiring new men. This stems back to the time when we met with the presidents of the American Railroads, including the former president of Southern Railway, where the people who were advocating that furloughed people should be given preference to employment in the capacities needed by the railways, rather than that they be continued on the unemployment rolls, for example. Sure, we advocate that these things be done, and we reached an agreement about their fruition in conference with the railroad presidents of the United States. This is an accomplishment in fact of that. We always preferred to see fur-

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loughed men used to hiring new ones.

Q. Mr. Gilbert, in view of that explanation you have just made, let me ask you this: Isn't it a fact that it was Mr. Tolleson who, on Southern, initiated with your people or your represents the suggestion to modify the seniority rules so that a man in one district could stand in for service in another district without forfeiting seniority? A. It could well be his boss told him to, as a result of the conferences he had.

Q. That is not answering my question. I want to ask you whether you know, having been so familiar with this entire controversy, in getting reports on the situation regularly, as you have testified you did, whether it was not your knowledge that it was Mr. Tolleson and not Mr.

Henry E. Gilbert—for Plaintiff—Cross

McCullum or Mr. Mitchell who initiated this suggestion in the first instance. A. I would not be able to say, because I do not know.

Q. On the basis of your knowledge, Mr. Gilbert, there was a memorandum of agreement signed by your representatives and Southern which, in fact, did modify the then existing seniority provisions, is that correct? A. It permitted the use of furloughed men from one division on another division without their having to forfeit their seniority on their original hiring division.

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Mr. Zorn: Mark this one, please.

(Defendant exhibit 4 marked for identification.)

By Mr. Zorn:

Q. Mr. Gilbert, I show you defendant exhibit 4 for identification. This is entitled "Memorandum of Agreement Between Southern Railway," and so on, and your organization. On the second page here, April 22, 1960, I ask you whether this was a memorandum agreement executed on that date, making the seniority changes to which you have just testified. A. Yes.

Q. It is. A. Yes.

Mr. Zorn: I offer it in evidence.

Mr. Kramer: Your Honor, I want to object on the ground, as I did before; this is irrelevant and immaterial to any issue in this case which pertains to any locomotive without firemen.

The Court: Overruled.

Deputy Clerk: Defendant exhibit 4 received in evidence.

Henry E. Gilbert—for Plaintiff—Cross

(Defendant exhibit 4 received in evidence.)

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By Mr. Zorn:

Q. Mr. Gilbert, on the second page of defendant exhibit 3—

Mr. Kramer: Did you say 3?

Mr. Zorn: Yes.

By Mr. Zorn:

Q. I am referring back to an earlier exhibit.

After the discussion about this memorandum on seniority, did Mr. Mitchell tell you that in connection with that matter of getting furloughed people back to work and I quote "Mr. Tolleson addressed the attached circular with copy of agreement to the furloughed firemen apprising them of the services needs and inquiring if they were interested in availing themselves of the opportunity to work."

Now, I show you defendant exhibit five for identification and, disregarding any handwriting on the exhibit for identification, was this the letter referred to by Mr. Mitchell, which he attached in his letter to you, defendant exhibit 3? A. That seems to be it.

Q. And as you understood this defendant exhibit five for identification, after you received Mr. Mitchell's letter enclosing this, this was, was it not, an effort on the part of Southern Railway to get as many furloughed people back

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to work as they could? A. I think it would fit in that category.

Q. Thank you.

Mr. Zorn: I offer exhibit 5 in evidence.

The Court: Any objection?

Henry E. Gilbert—for Plaintiff—Cross

Mr. Kramer: Object on the ground it is irrelevant and immaterial.

The Court: Overruled. Received.

Deputy Clerk: Defendant exhibit 5 received in evidence.

Mark Defendant 6 for identification.

(Defendant exhibit 5 received in evidence.)

(Defendant exhibit 6 marked for identification.)

By Mr. Zorn:

Q. Mr. Gilbert, I direct your attention to defendant exhibit 6 for identification, which is a letter to Mr. Tolleson from Mr. McCullum, dated May 27, 1960 and indicates that a copy of that letter was sent to you, and I will ask you whether you did ever receive a copy of that letter? A. Yes.

Mr. Zorn: I offer in evidence defendant exhibit 6.
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Mr. Kramer: No objection.

The Court: Received.

(Defendant exhibit 6 received in evidence.)

Deputy Clerk: Defendant exhibit 7 for identification.

(Defendant exhibit 7 marked for identification.)

By Mr. Zorn:

Q. Mr. Gilbert, I show you a document—defendant exhibit 7 for identification, being a letter dated June 9, 1960,

Henry E. Gilbert—for Plaintiff—Cross

addressed to Members GGC-BFL & E, Southern Railway System, signed by Mr. McCullum, with a notation that copies went to you and to Mr. Mitchell and I will ask you if you did receive in due course a copy of defendant exhibit 7 for identification. A. Yes, that was received in the Grand Lodge Office.

Q. Thank you.

Mr. Zorn: I now offer defendant exhibit 7 for identification which consists of a two-page letter, and an attached single page.

Mr. Kramer: No objection.

The Court: It will be received in evidence without objection.

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(Defendant exhibit 7 received in evidence.)

Deputy Clerk: Defendant exhibit 8 for identification.

(Defendant exhibit 8 marked for identification.)

By Mr. Zorn:

Q. I show you defendant exhibit 8 for identification, being a letter addressed to you at your headquarters in Cleveland under date of June 17, 1960, signed by W. E. Mitchell, and with a notation "Copy to Mr. McCullum," and ask you if you received that letter in due course. A. Yes.

Mr. Zorn: I offer defendant exhibit 8 for identification in evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

Henry E. Gilbert—for Plaintiff—Cross

(Defendant exhibit 8 received in evidence.)

(Defendant exhibit 9 marked for identification.)

The Court: How many of these do you have?

Mr. Zorn: I will tell you exactly, your Honor. I would say just about 8 more.

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The Court: Has Mr. Kramer had an opportunity to see them?

Mr. Kramer: No, I have not.

Mr. Zorn: He knows the files, but he has not seen these particular ones.

The Court: All right, we will take a few minutes recess.

Mr. Zorn: Fine.

(Short recess.)

Deputy Clerk: For the purpose of the record, your Honor, I have marked exhibits 10 through 20 for identification purposes. They will be described by counsel.

The Court: All right.

(Defendants exhibits 10 to 20 inclusive marked for identification.)

Mr. Kramer: Your Honor, with respect to plaintiff's exhibit 9, when I offered it, I could not find a clean copy and I used Mr. Gilbert's copy which is not as clear and it is more difficult to read. With the Court's permission I would like to substitute another copy, an identical document, but easier to read.

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The Court: All right.

Deputy Clerk: Plaintiff exhibit 9 in evidence is substituted.

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Mr. Zorn: If your Honor please, we have been able to agree on the introduction of a number of exhibits. For the record, I will identify them.

First is defendant exhibit 9 for identification which is a telegram dated July 11, 1960 to L. G. Tolleson, from W. E. Mitchell, vice president, DLF & E and we offer that in evidence.

Mr. Kramer: No objection.

The Court: Received.

Deputy Clerk: Defendant exhibit 9 is received in evidence.

(Defendant exhibit 9 is received in evidence.)

Mr. Zorn: Defendant 10 for identification is a telegram to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D.C. signed H. E. Gilbert, dated July 21, 1960.

I offer that in evidence.

Mr. Kramer: No objection.

The Court: Received.

(Defendant exhibit 10 received in evidence.)

Mr. Zorn: Defendant exhibit 11 for identification

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is a telegram dated July 22, 1960, addressed to Mr. E. C. Thompson, Executive Secretary, National Mediation Board, signed by Fred A. Burroughs,

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assistant vice president, Labor Relations, Southern Railway System.

On the other side of the copy submitted is a certification of that document by Mr. Thompson, Executive Secretary of the National Mediation Board.

I now offer defendant exhibit 11 in evidence.

Mr. Kramer: No objection.

The Court: Received.

(Defendant exhibit 11 is received in evidence.)

Mr. Zorn: Defendant 12 for identification is a telegram dated July 25, 1960 addressed to E. C. Thompson, Executive Secretary, National Mediation Board, Washington, signed by H. E. Gilbert.

I offer that in evidence.

Mr. Kramer: No objection.

The Court: Received.

(Defendant exhibit 12 is received in evidence.)

Mr. Zorn: Defendant exhibit 13 for identification is a letter dated November 28—

Mr. Kramer: A telegram.

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Mr. Zorn: 13?

Mr. Kramer: That is what I have got.

Mr. Zorn: Give us a moment's indulgence.

The Court: Surely.

(Pause.)

Mr. Zorn: Defendant exhibit 13 for identification is a letter dated November 28, 1961, addressed to

Henry E. Gilbert—for Plaintiff—Cross

Mr. H. E. Gilbert, President, BLF&E of Cleveland, Ohio, signed by Mr. McCullum, as General Chairman.

I offer that in evidence.

Mr. Kramer: No objection.

The Court: Received.

(Defendant exhibit 13 received in evidence.)

Mr. Zorn: Defendant exhibit 14 for identification is a letter dated May 22, 1962, addressed to Mr. R. L. McCullum, General Chairman, BLF & E, Southern Railway, Tuscumbia, Alabama, signed Mr. H. E. Gilbert and is on the stationery of the Brotherhood of Locomotive Firemen and Enginemen, Cleveland, Ohio with Mr. Gilbert's name on as president.

I offer 14 in evidence.

Mr. Kramer: No objection.

The Court: Received without objection.

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(Defendant exhibit 14 received in evidence.)

Mr. Zorn: Defendant exhibit 15 for identification is divided into two parts. Exhibit 15-A is a letter dated June 12, 1962 addressed to Mr. Lawson G. Tolleson, assistant vice president, Labor Relations, Southern Railway System, signed by Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, and the enclosure to the defendant 15-A for identification is a letter which has been marked defendant exhibit 15-B for identification, a letter dated June 4, 1962, to Mr. E. C. Thompson of the National Mediation Board, from Mr. Gilbert, president of the Brotherhood. The

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letter indicated copy of that letter was sent to Mr. McCullum.

I offer that exhibit in evidence.

The Court: Received without objection.

(Defendant exhibits 15-A and 15-B received in evidence.)

Mr. Zorn: Defendant exhibit 16 for identification is a letter dated July 20, 1962 on the stationery of the Brotherhood of Locomotive Firemen and Enginemen, addressed to Mr. L. G. Tolleson, Southern Railway System, signed H. E. Gilbert.

I offer that in evidence.

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Mr. Kramer: No objection.

The Court: Received.

Deputy Clerk: Defendant exhibit 16 received in evidence.

(Defendant exhibit 16 received in evidence.)

Mr. Zorn: Defendant exhibit 17 for identification, your Honor, is a telegram dated August 13, 1962, addressed to Mr. L. G. Tolleson, Southern Railway Company, Washington, D. C., signed R. L. McCullum, indicating also that copies of that telegram were sent to Mr. Thompson of the Mediation Board.

Mr. Gilbert, Mr. Jennings, and others. I offer defendant 17 in evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

Deputy Clerk: Defendant exhibit 17 in evidence.

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(Defendant exhibit 17 received in evidence.)

Mr. Zorn: Defendant exhibit 18 for identification is a letter on the stationery of the National Mediation Board dated August 14, 1962, and addressed, jointly, to Mr. L. G. Tolleson of Southern Railway System and Mr. H. E. Gilbert, president of the Brotherhood, signed by Mr. Thompson, the Executive Sec-

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retary of the Board.

I offer defendant exhibit 18 for identification into evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

(Defendant exhibit 18 received in evidence.)

Mr. Zorn: Defendant exhibit 19 for identification is entitled "Memorandum" and it is dated Nov. 15, 1962 and is a memorandum from Mr. J. W. Jennings to Mr. H. E. Gilbert and it is headed "Subject: Proposed Strike Action—Southern Railways." It is signed J. W. Jennings.

I offer that in evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

Deputy Clerk: Defendant 19 in evidence.

(Defendant exhibit 19 received in evidence.)

Mr. Zorn: Defendant exhibit 20 for identification is a letter dated Nov. 27, 1962 on the stationery of the General Grievance Committee, Brotherhood of Locomotive Firemen and Enginemen, Southern Rail-

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way System, and is addressed to "All Local Chairmen, BLF & E-Southern Railway System." And so on.

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It is signed R. L. McCullum, General Chairman, with a notation that it is approved by J. W. Jennings, and to the letter are two attachments, which we will also offer as part of the exhibit.

I am offering now defendant's exhibit No. 20 for identification in evidence.

Mr. Kramer: No objection.

The Court: It is received.

(Defendant exhibit 20 is received in evidence.)

Mr. Zorn: Your Honor, I have no further questions of Mr. Gilbert.

Mr. Kramer: I have a little redirect.

Redirect Examination by Mr. Kramer:

Q. Mr. Gilbert, I show you defendant exhibit 1 which is entitled "Chronology of Events in Connection with Violation of Vacation, Mileage Limitation and Diesel Agreements, between BLF&E and Southern Railway System." Do you know whether that is a complete list or not? A. No, I do not know whether it is complete.

Q. So far as you know, there may be— A. There could be others, yes, sir.

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Q. Mr. Gilbert, prior to Mr. Tolleson's discussions with Mr. McCullum which resulted in the 1960 agreements, pursuant to which the firemen could retain seniority on more than one seniority district, did you have discussions of

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the same nature, on the same subjects with any other official of the Southern Railway System? A. Well, I had discussed the question of preparing furloughed men in preference to new men with Mr. Harry de Butts, who was formerly president of Southern Railway.

Q. Was he president at the time you discussed it? A. He was.

Q. Did you discuss it with him alone? A. No, there was a group of us. I was on a committee of the Railway Executive Association who met a committee of railroad presidents on the question of utilizing the services of furloughed men who may then be subject to receive unemployment compensation under the Railroad Unemployment Act and obtain employment for them in capacities in which they could serve in preference to hiring new men.

Q. About when was that? A. Well, I would say that was back in 1957 or 1958 back along in there. It was shortly before Mr. de Butts was succeeded.

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Q. Mr. Gilbert, you said you were on a committee of the Railway Labor Executives Association. Will you state what that is. A. That is an association of the chief executives of the Standard Railroad Organizations in the United States.

Q. About how many? A. About 20, I think.

Q. Including the Brotherhood of Locomotive Firemen and Enginemen? A. Yes.

Q. You said you spoke to a group of railroad presidents? A. Yes, sir.

Q. Were they acting in behalf of an organization? A. Yes, they were, as we understood it, a committee of Railroad Presidents selected by the Association of American Railroads to talk with us on these matters of mutual interest.

Henry E. Gilbert—for Plaintiff—Redirect

Q. Was it the Association of American Railways? A. Yes.

Q. What is that? A. That is an association that represents, for certain purposes, the railroads in the United States.

Mr. Zorn: Just to have the record clear, this testimony relates to other railroads, it relates to history apparently in connection with some of this seniority modification. My basic objection will stand to this entire line of testimony.

Mr. Kramer: Your Honor, I objected to the whole subject matter. I was overruled.

The Court: That is what the Court was just thinking. In other words, all of the evidence that we have, we just got 20 exhibits that pertain to seniority during the time that you now say you object to.

Mr. Zorn: Let me clarify that for you.

I do not think I am being inconsistent. The purpose of what we have introduced when you come to read it, you will see relates solely and exclusively to this particular dispute, on the genesis of this particular dispute.

Now, when I did get into the matter of identifying on the question of modifying on the basis of seniority, that was April 1960, as to part of the entire story of what constitutes this dispute.

Now, this evidence goes back to general discussions away back in 1957, with no relationship whatever to the fact that we were in controversy about contract obligations here not in 1957, but later.

The Court: Objection overruled.

Henry E. Gilbert—for Plaintiff—Redirect

Mr. Kramer: Read the last question.

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(Record read.)

By Mr. Kramer:

Q. And was one of the members of the Railroad Committee, Mr. de Butts? A. Yes.

Q. At that time he was president of Southern Railways? A. Yes.

Mr. Kramer: No further questions.

Mr. Zorn: No further questions.

The Court: Mr. Gilbert, the Court understands from your testimony that you have been connected with the Brotherhood of the Firemen for 32 years, about.

The Witness: In an official capacity, I have membership extending beyond that.

The Court: You are familiar with the internal workings of your organization.

The Witness: Yes.

The Court: Mr. McCullum is the Chairman?

The Witness: Yes, he is the Chairman, General Chairman of our committee on the Southern Railroad.

The Court: On the Southern Railway?

The Witness: Yes.

The Court: Now, does he report to you?

The Witness: Not directly, only on those matters

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that relate to violations on which he has been unable to adjudicate or matters on which he desires assistance in handling with the carrier representatives.

Henry E. Gilbert—for Plaintiff—Redirect

The Court: Then the Court understands that you assign, upon request, a vice president?

The Witness: Yes.

The Court: Of the National?

The Witness: International?

The Court: Of the International, to say for instance, the Southern, to assist Mr. McCullum?

The Witness: Yes, and his committee.

The Court: What authority does that vice president have then, does he still report back to the International?

The Witness: He does, yes. He has a certain authority as it relates to settlement. However, there are certain authorities in relationship to the operation that only the International President may give.

The Court: All right. Now, in the contract or the agreements that we are concerned with, in this particular matter, did you have any personal knowledge of that agreement, that is, the agreement that I am referring to as of May of 1950?

The Witness: Yes, I happen to be assigned as vice president at that time to supervise the strike

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that was in effect in connection with that.

The Court: Who drew it up so far as the International is concerned?

The Witness: That was signed by our international president in what we term our "diesel committee." Mr. D. B. Robertson was then the president.

The Diesel Committee was comprised of nine general chairmen from the three regions in the United States.

Ralph Lindsay McCullum—for Plaintiff—Direct

The Court: Now, then can you tell the Court from your chronological plaintiff's No. 1, or I mean defendant No. 1, or from any other data, when it was that you received the first notice either orally or written pertaining to any violation or any alleged violation of the agreement?

The Witness: I believe it was in 1959, your Honor, that is my recollection.

The Court: So, from 1950 to 1959, there was no problem pertaining to section IV of that agreement?

The Witness: Not to my knowledge.

The Court: All right, you may step down.

(Witness excused.)

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Mr. Kramer: Shall I call my next witness or shall we recess?

The Court: No. We will not recess; call your next witness.

Thereupon, RALPH LINDSAY McCULLUM was called as a witness by and on behalf of the Plaintiff, and, being first duly sworn, was examined, and testified as follows:

Direct Examination by Mr. Kramer:

Q. Will you state your full name? A. Ralph Lindsay McCullum.

Q. What is your address? A. 730 North Jefferson Street, Tuscumbia, Alabama.

Q. Spell Tuscumbia. A. T-u-s-c-u-m-b-i-a.

Q. Do you hold an official position with the Brotherhood of Locomotive Firemen and Enginemen? A. General Chairman.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. General Chairman of what? A. Brotherhood of Locomotive, General Grievance Committee.

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Q. General Grievance Committee where? A. Our office is located Tuscumbia.

Q. What railroad? A. Southern Railroad.

Q. Any other railroad? A. The Affiliated Lines, including the Carolina and Northwestern.

Q. How long have you been General Chairman? A. Since January 27, 1955.

Q. Before that did you hold some other official positions with the Brotherhood? A. Local Chairman.

Q. Local Chairman on the Southern Railway? A. Memphis Division, Southern Railway.

Q. How long did you hold that position? A. July 1944 to January 27, 1955.

Q. While you were local chairman were you also employed as a fireman by the Southern? A. Yes.

Q. Were you employed as a fireman by the Southern prior to 1944? A. Yes.

Q. How long prior thereto? A. From December 16,

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1939.

Q. Is that your seniority date? A. Yes.

Q. Are you also qualified as an engineer? A. Yes.

Q. Have you worked as an engineer on the Southern? A. Yes.

Q. Now, as general chairman of the General Grievance Committee on the Southern, do you have the files and records of your predecessors? A. Yes.

Q. When was the first Diesel agreement entered into on the Southern Railway? A. May 11, 1944.

Q. And was that agreement with the Southern alone or

Ralph Lindsay McCullum—for Plaintiff—Direct

was that a regional agreement? A. That was what was termed the Southeastern Region Agreement.

Mr. Zorn: For the record, your Honor, I just want to know the historical aspects that are being inquired about, are part of my basic objection, which is a continuing objection.

The Court: All right. That will be overruled. The

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Court would like to hear what he does.

By Mr. Kramer:

Q. Was that the first time that the Southern Railway System was party to a regional Diesel agreement? A. I think so.

Q. When you became General Chairman, did the Southern assign a fireman taken from the seniority ranks of the firemen to every locomotive with more than 90,000-pound weight and drivers?

Mr. Zorn: I object to that as a completely and highly improper question.

The Court: The objection is sustained on the form of the question, Mr. Kramer.

By Mr. Kramer:

Q. Mr. McCullum, from the time you first worked as a fireman, until three years ago or so, are you aware of any instance in which the Southern operated a locomotive without a fireman taken from the seniority ranks of the firemen, on a locomotive having more than 90,000-pound weight and drivers? A. Yes; several—

Ralph Lindsay McCullum—for Plaintiff—Direct

Mr. Zorn: That is objected to on the basic proposition that practice prior to this dispute is not proper
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testimony in this Court. That is our basic objection that I have made from the very beginning.

Mr. Kramer: No, your Honor.

The Court: This is personal knowledge on his part?

Mr. Kramer: Yes.

The Court: All right.

By Mr. Kramer:

Q. What is your answer? A. Yes, several times.

Q. Several times they did not have a fireman? A. Yes.

Q. About how long? A. Well, since July 19, 1960.

Q. No. I said prior to 1959. A. Oh, I am sorry. I misunderstood. Prior to 1959 there may have been, or there were a few isolated cases where switchmen or a hostler from some other—

Q. Hostler.

Since you have been General Chairman until 1959, how did the Southern assign firemen or helpers to Diesel locomotives? A. Well, vacancies on the runs on which Diesels were used as power were advertised by bulletin as provided in the agreement, and men were assigned in seniority order.

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Q. And if there were no men who were available what did they do? A. Assign the junior fireman on it.

Q. If that was used up what did they do? A. Well, naturally, men were employed to fill the list for the required number.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. Up until 1959 they hired additional firemen, did you say, to fill vacancies? A. Yes; and since 1959.

Q. How long after 1959? A. I couldn't give you the exact date that the last man was hired. Because they might have hired some yesterday.

Q. Do you recall the first time you protested to anybody on the Southern about—

The Court: Wait just a moment. Mr. Kramer, you can help the Court if this witness can give more complete data on information that he has on hiring.

In other words, does the man automatically become a union man, a fireman?

The Witness: What?

The Court: If a new man is hired by the Southern Railway, do you automatically have knowledge of his being employed?

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A. No.

By Mr. Kramer:

Q. Do you have a seniority roster, Mr. McCullum? A. Yes.

Q. Is that seniority roster agreed upon from time to time by you and somebody at the Southern? A. The rosters are re-posted January 1 and July 1 of each year, the seniority rosters, and every employee has a notice of it and can review it.

If there is any mistake in that he has sixty days to appeal for correction.

Q. Does that seniority roster show the seniority date of each fireman? A. Yes, sir.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. Does it show the seniority date of each fireman whether or not he is a member of the union? A. Yes.

Q. And what does the seniority date indicate? A. That is the day he established age as a locomotive fireman on the railroad.

Q. How does he establish what you call "age" as a locomotive fireman? A. The first pay trip he makes after being assigned to the Extra List.

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Mr. Kramer: Does that clarify your Honor's doubts?

The Court: Well, the Court understands that Mr. McCullum has been the General Chairman since 1955.

The Witness: Right.

The Court: From the years '55 to '59 do you have any particular knowledge of the number using the seniority list or any other data?

A. I have a fairly accurate list since May 11, 1944, which is about 872 firemen that has been employed on the Southern since the Diesel agreement has been in effect.

By Mr. Kramer:

Q. Which Diesel agreement? A. May 11, 1944.

Q. You don't have a 1950 one? A. '44. It was revised in 1950.

Q. They employed how many firemen during that period? A. 872 are still on the list. There is more than that number, because many have come and gone in that time. But that many still remains on the list as of today.

Q. So some number in excess of 800 and something were employed after they entered into their first Diesel agreement? A. That is right.

Ralph Lindsay McCullum—for Plaintiff—Direct

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Q. What are your duties as General Chairman? A. Well, as General Chairman we negotiate with the carrier on schedule revisions. We are responsible for knowing what is going on on the railroad and see that the agreements are complied with.

Q. Now, Mr. McCullum, the term "schedule agreement" as used in the railroad industry, is that the same term that is used elsewhere, does that mean the same as collective bargaining agreements in other districts? A. That is what it is.

Q. You call it a schedule agreement? A. That is just a term used on the railroad.

Q. When you said it is your duty to see that the agreements are complied with, what do you mean? A. Well, I don't hardly—a grievance would originate on a particular division and it is handled through the usual channels, the local chairman with the superintendent. If he cannot adjust it, it comes to me for handling it with the general manager or with the personnel office in Washington.

Q. When after the isolated instances that you referred to earlier in which you thought the Southern had operated a locomotive without a fireman, when you thought they should have one under the Diesel agreement, when there-

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after, well, did there thereafter become more frequent occasions? A. Yes; after around July 19, 1960.

Q. Did you complain to an official of the Southern? A. Yes.

Q. To whom? A. Well, to general managers first, and then to the highest officer designated by the Southern with which we deal in Washington, D. C.

Q. Who was that? A. Mr. Tolleson. L. G. Tolleson.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. Will you give his first name? A. Lawson.

Q. Have you written to Mr. Lawson Tolleson frequently about alleged violations of the Diesel agreement? A. Yes; there has been well over two hundred instances reported to him since July, 1960.

Q. About how many letters have you written to him on that subject, sir? A. Well, there would be quite a few over a hundred. A lot of these lists would be four or five, maybe, in one letter. But there has been over two hundred cases where the carrier has changed the rules and working conditions relative to Diesel firemen.

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Q. Did Mr. Tolleson reply to those letters? A. To about six of them.

Q. He replied to six in over a hundred? A. Roughly. Six or eight.

Q. Did Mr. Tolleson deny they had run these without firemen taken from the seniority ranks of the firemen? A. No, he did not.

Q. Did you have any conferences with Mr. Tolleson on the subject? A. Yes.

Q. Mr. McCullum, I show you Plaintiff's Number 4 in this case and ask you whether that is a portion of a Section 6 notice served on you by the Southern Railway, this portion dealing with the employment of firemen? A. Well, I couldn't say if that is word for word without checking it. But that is the basis of it.

Q. Was that Section 6 notice pending while you had the conferences you just referred to with Mr. Tolleson?

Mr. Zorn: Fix the date of those conferences.

Mr. Kramer: He said beginning in 1960.

Ralph Lindsay McCullum—for Plaintiff—Direct

By Mr. Kramer:

Q. Did you say you had conferences beginning in 1960? Let me ask you: When were these conferences you had
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with Mr. Tolleson? A. I would have to check to give you the first date. Now do you mean on this—

Q. On the Diesel. A. —on this notice you showed me?

Q. No; on the Diesel question. A. About March 1959.

Q. 1959? A. Maybe it is 1960. I can check that in just a moment.

Q. Will you, please? A. March 1960, because the agreement we consummated right after that was April 1960. That is right.

Q. Was that November 2nd, 1959 notice to the Southern still pending at that time? A. Yes.

Q. What did Mr. Tolleson say to you about the operation of a locomotive without a fireman? A. He made it quite clear at that time that he did not intend to employ additional firemen.

Q. When did he make that plain? A. Well, the first time that he actually said it in so many words I think was around July 19, 1960, in a conference in his office.

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Q. What was the occasion of that conference, and who was present? A. That conference was requested because of the carrier's operation of trains in violation of—actually they changed Section 4 of the Diesel agreement and operated them without firemen taken from the seniority ranks of firemen.

That was the reason for the conference.

Q. Who was present? A. I could check my notes in a minute. I am pretty sure Julian M. Ford was present with

Ralph Lindsay McCullum—for Plaintiff—Direct

Mr. Lawson Tolleson and vice-president Mitchell was present with me. I think that was about it.

Q. Who is Mr. Ford? A. He is Assistant Director of Labor Relations for the Southern Railway System.

Q. Was that the first time that Mr. Tolleson made plain, or told you that he was not going to employ any more firemen? A. Yes.

Q. Since this July 19, 1960 conference with Mr. Tolleson and Mr. Ford, have you had subsequent conferences on the same subject? A. Yes, in mediation.

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Q. I mean subsequent conferences with Mr. Tolleson. A. Yes.

Q. Has Mr. Tolleson ever since then changed his position with respect to employing sufficient firemen to have one on every locomotive? A. No. He has not changed his position; and the action of the carrier in changing our contract rules without negotiations is continuing in greater number.

Mr. Zorn: I move to strike the witness' answer as entirely conclusionary.

The Court: All right. The answer will be stricken unless there is a foundation laid that he has knowledge of it.

By Mr. Kramer:

Q. Mr. McCullum, I show you a document marked Plaintiff's Exhibit 5 and ask you if that is a letter from you, a copy of a letter from you to Mr. F. A. Burroughs, assistant vice-president, Labor Relations, on Southern Railway Company and some other railway companies. A. Yes, it is

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. Was this notice served pursuant to Section 6 of the Railway Labor Act? A. Yes.

Q. And does it have an attachment? A. Yes.

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Q. Was this attachment—was a joint proposal served by you on behalf of the BLF&E, and by others in behalf of other railroad unions? A. Yes.

Q. How many other railroad unions? A. Well, it was all of the operating group, the Firemen, Engineers, Conductors and Switchmen.

Q. Five in all? A. Yes.

Q. Did all five of you serve identical notices? A. Yes.

Q. Did the Southern Railway file a counter-proposal to your Section 6 notice? A. Yes.

Q. I show you a document marked Plaintiff's Exhibit 6 and ask you if that is a copy of the Southern's counter-proposal. A. Yes, that is it.

Q. This is the one addressed to you? A. That is right.

Q. I ask you to read the last of their proposals.

Mr. Zorn: That is objected to, your Honor, for the

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same reason Mr. Kramer objected to my reading anything.

Mr. Kramer: All right. Read all of the proposals, the whole three of them.

Mr. Zorn: I object to that. The document is in evidence.

The Court: The document speaks for itself.

Mr. Kramer: All right.

Ralph Lindsay McCullum—for Plaintiff—Direct

By Mr. Kramer:

Q. At the time they served you their counter-proposal of September 16, 1960, did they also serve you—I will start that question over.

Does your organization, with you as General Chairman, represent on one of the subsidiaries of the Southern, Engineers? A. Yes.

Q. On which one? A. Georgia, Southern and Florida.

Q. On that same date, September 16, 1960, did the Southern serve you a Section 6 notice with respect to engineers on the Georgia, Southern and Florida? A. They did.

Mr. Kramer: Will you mark this, please?

The Clerk: Plaintiff's Exhibit Number 10 for
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identification.

(Plaintiff's Exhibit 10 was marked for identification.)

By Mr. Kramer:

Q. I show you a document marked Plaintiff's Exhibit 10 for identification, on the letterhead of the Southern Railway System, addressed to you and signed by Fred A. Burroughs, and ask you if that is the Section 6 notice with respect to the Engineers on the G.S.&F. A. That is it.

Q. And does this Section—

Mr. Zorn: May I object to this line of inquiry? I don't know that there is any dispute that has been mentioned in this case with respect to engineers thus far. We have been dealing exclusively with

Ralph Lindsay McCullum—for Plaintiff—Direct

firemen. I fail to see any relevance with respect to engineers on one of the subsidiaries.

The Court: What is the relevancy?

Mr. Kramer: If your Honor would examine this document you would find that it is word for word the same as the proposal with respect to the finding, except that it proposes to eliminate all engineers on the Georgia, Southern and Florida. I think since the language is identical, it corroborates our position that they were seeking a change when they

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served their Section 6 notice with respect to firemen. Because obviously, the elimination of engineers would be a change in working conditions.

Mr. Zorn: But, your Honor, we are dealing here with Section 6 notices with proposals for new agreements. This case is bottomed on the basic proposition.

The Court: Are you objecting?

Mr. Zorn: I am, sir.

The Court: The objection will be sustained.

By Mr. Kramer:

Q. Mr. McCullum, what is the practice on the Southern Railway now, to your knowledge, with respect to operating locomotives without someone from the seniority ranks of the firemen being a member of the crew? A. There are a few isolated cases where trains have been operated without a fireman taken from the seniority ranks of firemen, or with anyone, sir. However, in 99 per cent of the cases the carriers use a form of convenience, trainmasters, station agents, train porters, and so forth.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. But are they using someone from the seniority ranks of the firemen? A. No.

Q. Do you know of any regularly scheduled trains that
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run regularly without a fireman?

I mean without someone taken from the seniority ranks of the firemen. A. I stated earlier that this was growing steadily worse, progressively since July 19, 1960. There are two trains currently being operated on the Richmond Division, almost daily.

Now they have a man taken from the seniority ranks of firemen occasionally. But they are almost daily operated with road foreman of engines and/or trainmasters.

Q. And not someone from the seniority ranks of the firemen? A. That is right.

Q. Mr. McCullum, I show you a letter marked as Plaintiff's Exhibit 7, and ask you if that is the original of the letter addressed to you by Mr. Burroughs. A. Yes, that is.

Q. And what was the occasion of that letter? A. This had reference to the carrier Section 6 notice that was served November 2, 1959. This letter was to advise that the carrier was withdrawing attachment "a" from national handling.

Q. And had you asked Mr. Burroughs for such a letter
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or a similar letter? A. Do you mean did I ask him for that?

Q. Yes. A. No.

Q. After the Southern served this letter of September 16, 1960, did you have conferences with respect to that Section 6 notice? A. State that again, please.

Q. After you served your Section 6 notice of September 7, 1960, and the Southern served its counter-proposal, Sec-

Ralph Lindsay McCullum—for Plaintiff—Direct

tion 6 notice, of September 16, 1960, did you have conferences with respect to those notices? A. Yes. We had a conference. You are speaking now of the September 7 and September 17? Yes.

Q. When were those conferences? When was the first such conference?

The Court: Do you have a diary or memorandum?

The Witness: Not exactly.

The Court: Well, the Court is going to adjourn at this time until tomorrow at 10:00 o'clock, and you can get any data that you do have that can refresh your recollection on conferences and dates.

(Whereupon, at 4:20 p. m., the trial adjourned, to resume Wednesday, February 20, 1963, at 10:00 a. m.)

Proceedings

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil No. 2881—62

[SAME TITLE]

Washington, D. C.
Wed., February 20, 1963

The above-entitled cause was resumed for hearing before
HON. LEONARD P. WALSH, Judge. (Civil non-jury), at 10
o'clock a.m., Wednesday, February 20, 1963.

APPEARANCES:

For the Plaintiff:

Mr. Milton Kramer, Esq.
and
Mr. Russell B. Day, Esq.

For the Defendants:

Mr. Burton A. Zorn, Esq.
Mr. Thomas A. Flannery, Esq.
Mr. Larry M. Lavinsky, Esq.
Mr. Sol G. Kramer, Esq.

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PROCEEDINGS

Ralph Lindsay McCullum—for Plaintiff—Direct

Thereupon RALPH LINDSAY McCULLUM a witness, having been previously sworn, resumed his testimony as follows:

The Court: All right, gentlemen.

Direct Examination by Mr. Kramer:

Q. Mr. McCullum, have you examined the records to determine how many new employees the Southern Railway System has hired as firemen, since May, 1950 until 1960? A. Yes.

Q. How many new employees did they hire, would you begin with June, from June, 1950 through the end of that year? A. Fifty-three.

Q. And how many in 1951? A. Forty-eight.

Q. And in 1952. A. Twenty-one.

Q. 1953? A. Eight.

Q. 1954? A. Five.

Q. Would you read them up through 1959? A. 1955 is 18.

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56 is 33. 57 is 18; 58 is 13; 59 is 27.

Q. Now from 1960 up through April. A. January through April is 15.

Q. Now, what is the total from June, 1950 through April, 1960? A. 259.

The Court: I did not get that last figure. What was that figure, 259?

The Witness: Yes.

Mr. Kramer: June, 1950 through April, 1960.

The Court: What?

Mr. Kramer: Employees—well, it is new employees hired by the Southern as firemen. Well, the next question I will bring out—is that limited to those who are still on the seniority roster?

The Witness: Yes.

Ralph Lindsay McCullum—for Plaintiff—Direct

By Mr. Kramer:

Q. Now, were there other employees who were hired as new employees by the Southern in that period, as firemen who are not on the seniority roster today? A. That is correct.

Q. Now, for what reason would they not be on the seniority roster, even though hired during that period? A. Well,

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there is a certain number that quit. There is some that have been dismissed. There is some that filed or became physically disabled. There is some who failed to return when they are called from furlough. We have 100 or so who are promoted to officials of the railroad.

Q. On the basis of your experience, Mr. McCullum, in a ten-year period, what percentage of new employees, hired as firemen in that period would be on the seniority roster at the end of that period?

Mr. Zorn: Objected to unless a proper foundation is laid.

The Court: Well, hasn't he laid the foundation? Mr. McCullum yesterday testified that he had spent his life in this, hadn't he, that he had been division and now regional?

Mr. Zorn: My only point, I think this is purely speculative.

The Court: You can lay the foundation. Where would he get his figures?

Mr. Kramer: He has been around a long time. I have laid the foundation because he points out the reasons that they are not on. I will try to lay some more foundation.

The Court: All right.

Ralph Lindsay McCullum—for Plaintiff—Direct

By Mr. Kramer:

Q. Mr. McCullum, have you been following the hiring and termination of employment of firemen during the period

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you have been an official of the Brotherhood? A. At the time I was local chairman of the Memphis Division before becoming general chairman, of course I followed it very closely, because we notified the carrier when there was a need for men and they would employ them to fill the list. But as general chairman I do not watch each separate list as close as our local chairmen do who are primarily responsible for that.

Q. I take it when you were local chairman you then followed very closely your list. A. Yes.

Q. And as general chairman do you follow all the lists? A. Yes.

Q. And do you observe new men coming on the lists and old men dropping off. A. Yes.

Q. Well, upon the basis of your experience both as local chairman and as general chairman at the end of the ten-year period how many employees, hired as new employees, as firemen, during a ten-year period will be on the seniority roster at the end of that period? A. Of course that would vary some, depending upon—

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Q. Give a percentage. A. Well, I would say that based on my experience, during my work with the railroad and the Brotherhood, it would be something like forty per cent.

Q. Forty per cent would be on or off? A. Off. There would be sixty per cent of them that were employed that would still be in the service at the end of the ten-year period.

Ralph Lindsay McCullum—for Plaintiff—Direct

Q. Are we to understand your figure of 259 in your opinion represents about 60 per cent of the firemen hired as new men, by the Southern during the period about which you spoke? A. Based on my experience of averages.

Q. Mr. McCullum, I asked you yesterday whether, following the Section Six notices, by both sides, there was a conference held with the Southern concerning their last Section Six notice? A. There was.

Q. When was that? A. October 10, 1960.

Q. What took place at that conference? A. Well—

Q. Sorry, your Honor. I made a mistake about the rule when invoked yesterday. I have some people here who might be used on rebuttal.

The Court: All right.

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Mr. Kramer: They might not be witnesses but they might be used on rebuttal.

Deputy Clerk: Will the witnesses please retire to the witness room? The Marshal will show you the way.

The Court: All witnesses will be excluded.

Mr. Kramer: Sorry, I overlooked that point.

Mr. Zorn: I had missed it—too. I had not seen them.

By Mr. Kramer:

Q. What took place at that conference? A. That is the usual conference to discuss the carrier proposal and to discuss the employee proposal as embodied in the respective Section 6 notices.

Q. Well, did Mr. Tolleson tell you what the purpose of that notice was?

Ralph Lindsay McCullum—for Plaintiff—Direct

Well, was Mr. Tolleson there? A. Yes.

The Court: Wait just a moment. Mr. McCullum, you can help the court. The question was asked you what happened at the conference and you said, "The usual procedure."

The Court does not know what the "usual procedure" is.

The Witness: We discussed the meaning and what was embodied in each of the respective Section 6 notices, as to their rates of pay, rules and working conditions.

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By Mr. Kramer:

Q. Was Mr. Tolleson there? A. Yes.

Q. Did he tell you what the purpose was of his September 16, 1960 notice? A. Yes.

Q. What did he state was its purpose? A. Well, the purpose that he stated was to do exactly what it said it was to do: Was to eliminate the use of firemen.

Q. Did he advise you that it was his purpose to change existing agreements or to clarify existing agreements?

Mr. Zorn: Objected to.

The Court: The objection on the leading question is sustained.

By Mr. Kramer:

Q. Mr. McCullum, have you learned at any time—

The Court: Wait just a moment. This is Mr. McCullum.

Ralph Lindsay McCullum—for Plaintiff—Direct

Mr. Kramer: I said, Mr. McCullum, have you learned at any time that the Southern Railway takes the position that its September 16, 1960 notice was intended to be a clarification or clarifying change of existing agreements rather than—

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Mr. Zorn: Objected to as leading.

Mr. Kramer: I asked whether he has learned that fact.

Mr. Zorn: The witness can state what the conversation was.

Mr. Kramer: I am not talking about that conversation.

The Court: Well, the objection on the basis that it is a leading question, certainly the question suggests the answer.

Mr. Kramer: I do not see that it does, your Honor.

The Court: Well, the Court will sustain the objection as the question is asked. The witness may testify as to the subject matter of any conversation.

By Mr. Kramer:

Q. At that October 10, 1960 conference, Mr. McCullum, what did Mr. Tolleson say was the purpose of his notice?

A. The purpose of the notice was to change existing agreements. There was no discussion held during either of the conferences which would indicate that the carrier had any intention that it was merely to clarify present agreements. It was a proposal for a new agreement.

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Mr. Zorn: Move to strike that. I think this witness should be limited as to what was said.

Ralph Lindsay McCullum—for Plaintiff—Direct

The Court: Well, the Court had understood that he was telling what Mr. Tolleson had said.

Mr. Zorn: But he has just testified to an inference that he drew from the conversation, your Honor. I would move to strike the answer.

The Court: You are objecting to the proposal for a new—that is the last part of what Mr. McCullum said.

Mr. Zorn: If we could have the answer, I believe it would clarify it.

The Court: All right.

Mr. Zorn: It is this witness' conclusion.

The Court: It will stay on the record.

Mr. Zorn: All right, sir.

By Mr. Kramer:

Q. How did that conference conclude, Mr. McCullum? Was anything said about further conferences? Or was—what was said at the conclusion of the conference? A. It was the mutual agreement—the conference was recessed subject to being reconvened at the request of either party on a mutually satisfactory date.

Q. Well, what happened next with respect to that notice? A. The carrier notified the Mediation Board or at—

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tempted to have the Mediation Board take jurisdiction.

Q. Well, did they succeed? A. Yes.

Q. When did they invoke the meeting? A. We went back in session on August 21, 1962.

Q. Do you know when they invoked Mediation. A. The exact date I do not know because they did not write me. Mr. Tolleson contacted Mr. E. C. Thompson, secretary of

Ralph Lindsay McCullum—for Plaintiff—Direct

National Mediation Board. Then he, in turn, contacted President Gilbert in Cleveland. I did not get a copy of it.

Q. Did Mediation sessions begin August 21? A. August 21.

Q. How long did they continue? A. August 30.

Q. What happened then? A. The case was recessed by the Board for Board consideration.

Q. Is that what the Board advised you? A. Yes.

Q. Recessed for Board consideration. A. Right.

Q. Has anything happened since then in that case? A.

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No.

Q. So far as you know, was it still pending before the Board then? A. That is right. The Board still had jurisdiction.

Q. All right.

Mr. Kramer: Mark this for identification.

Deputy Clerk: Plaintiff's Exhibit 11 for identification.

(Plaintiff's exhibit 11 is marked for identification.)

By Mr. Kramer:

Q. Mr. McCullum, I show you a document marked Plaintiff's exhibit 11 for identification, entitled, "Historical Reference to Alleged Violations of the National Diesel Electric Agreement of 1957." It says, "By the Southern Railway System."

Have you seen this document before? A. I have.

Q. What is it? A. It is a chronology of the correspondence and of the cases where the carrier violated Section

Ralph Lindsay McCullum—for Plaintiff—Direct

IV of the Diesel Agreement. It was called to the carriers' attention.

Q. Where was that prepared? A. At Grand Lodge, in Cleveland.

Q. What was the document prepared from? A. From
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correspondence that I had furnished the Grand Lodge in connection with this dispute.

Q. Is that a list of the violations, or that you thought were violations that you reported to the Grand Lodge? A. The majority or practically all of these were cases that were reported to Mr. Lawson G. Tolleson.

Q. I asked if these are the ones you reported to the Grand Lodge? A. They got a copy of the correspondence had with Mr. Tolleson.

Q. How far down to date does that list go? A. September 19, 1962.

Q. Has the Southern continued—

Mr. Kramer: I offer this exhibit 11 in evidence.

Mr. Zorn: I object to its introduction because on the face of the exhibit it is a self-serving statement. Secondly, it contains a series of alleged facts dealing with violations and particular instances and circumstances which are alleged to have happened. Obviously, this witness has no personal knowledge.

The Court: But he does, Mr. Zorn.

Mr. Zorn: Of each of these violations.

The Court: That is just what he got through testifying to as the Court understood. We may clarify it.
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Mr. Zorn: May I clarify it?

The Court: Yes.

Ralph Lindsay McCullum—for Plaintiff—Direct

By Mr. Zorn:

Q. Mr. McCullum, with respect to each and every one of the incidents referred to in this document, plaintiff's exhibit 11 for identification, where you talk of, for example, a porter being used on a train, a train being run without a fireman, and so on down these multitudinous statements of alleged violations which you claim are violations, did you personally have knowledge in each instance with respect to all of these allegations of violations, as to the specific fact? Were you there, and did you see the things that you refer to in this document? A. Mr. Zorn, the things referred to in this document are a matter of record that was referred to Mr. Tolleson through the usual channels in an appeal. I did not have personal knowledge that I was on the property. You see the Railroad covers fourteen states and I could not possibly be in all of them at one time. But these have all been referred to Mr. Tolleson, and he has not objected or denied that one of them occurred.

Mr. Zorn: That is not my question. My question is very simple:

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Do you have personal knowledge with respect to every incident which is reported in this document, plaintiff's exhibit 11 for identification, containing eight pages of detailed statements of alleged violation? That is my question.

A. I had personal knowledge of those as far as it refers to your method—as to our method of handling things that are referred to me.

Q. That is not my question. My question is very simple: Go through all eight sheets of this exhibit and tell us

Ralph Lindsay McCullum—for Plaintiff—Direct

whether you were there, whether you observed personally what you are reporting.

The Court: The witness has already answered that, that he was not there.

Mr. Zorn: That is my objection.

The Court: And that he could not possibly be there. But the Court understood that your objection was predicated on the basis that this exhibit was not a result of the reports made by this witness to the Grand Lodge.

Mr. Zorn: No, your Honor. My objection is two-fold. This is a document prepared by the plaintiff from the Plaintiff's organization. It sets forth in great detail a whole series of alleged specifics of what happened with a particular train on a particular day.

My objection is that there is no proof before this court that any of those incidents have actually occurred. That is my basic objection.

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The Court: Yes. But the Court understands from the witness that this data was compiled from reports that he personally made to the Grand Lodge in Cleveland.

Mr. Zorn: Yes, except that he has now stated that he, himself, had no personal knowledge of any of these.

The Court: The objection will be overruled.

Deputy Clerk: Plaintiff exhibit 11 received in evidence.

(Plaintiff's exhibit 11 is received in evidence.)

Ralph Lindsay McCullum—for Plaintiff—Direct

The Court: It is a matter of concern to the Court—is this inclusive of Plaintiff's exhibit No. 1?

Mr. Kramer: Plaintiff's No. 1 was excluded from evidence.

The Court: Plaintiff's exhibit No. 1, wasn't that the document referred to by Mr. Gilbert as being compiled on complaints?

Mr. Kramer: I think on cross examination they introduced a document.

The Court: Defendants' No. 1.

Mr. Kramer: It is not the same. So far as I know, it is not.

This document is contrary to what Mr. Zorn said. It has very little specifics. It is a compilation of what

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Mr. McCullum stated in more detail in his reports to the Grand Lodge. It listed about 150 letters—did you say yesterday?

The Witness: Something over a hundred.

By Mr. Kramer:

Q. Instead of putting in 100 letters, I thought I would put that in.

The Court: All right.

By Mr. Kramer:

Q. That list was September, 1962, was it not? A. Now, may I clarify something?

Q. Yes. A. I understood from your Honor, in this last one was his question that I did not have personal knowledge of any of them. He asked me if I had personal knowledge of every single one of them.

Ralph Lindsay McCullum—for Plaintiff—Cross

Q. All right. That matter is disposed of.

That list ended September, 1962. Has the Southern continued to operate locomotives without firemen taken from the seniority ranks of the firemen since then? A. Yes, in greater numbers.

Q. What do you mean by "in greater numbers"? Do you mean greater frequency? A. Yes, more trains.

Mr. Kramer: You may cross examine.

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Cross Examination by Mr. Zorn:

Q. Mr. McCullum, you testified that between June of 1950 and April of 1960 there were 259 new hires by Southern as firemen, is that correct? A. Yes.

Q. Where did you get those figures and what are those papers that you have before you? A. Those figures came from the seniority list published by the Southern Railway containing names of all engineers and firemen currently holding seniority on all districts, divisions and subdivisions, as such.

Q. When did you get that list? A. I get them twice a year.

Q. Do you have those lists here in court? A. Yes.

Q. Tell me first, what are these papers you have before you while you are testifying here, Mr. McCullum, the yellow sheets. What do they consist of? A. What do they consist of?

They are just personal notes.

Q. Personal notes. Personal notes of what nature? A. Pertaining to this case.

Q. Well, what is the top sheet you have there? A. The

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top sheet contains the summary I just gave on the number

Ralph Lindsay McCullum—for Plaintiff—Cross

of firemen employed each year since the diesel agreement had been in effect.

Q. Do you mind if I look at those papers, Mr. McCullum?

The Court: No. Counsel is entitled to look at them, Mr. McCullum. You used them to refresh your recollection, did you not?

A. Just that top one.

The Court: For the purpose of the record, will you identify that?

Mr. Zorn: Yes, your Honor.

The Court: The Clerk will mark them.

Mr. Zorn: Shall we mark them all as one exhibit for identification?

The Court: Whatever way—just as long as they are identified for the record.

Deputy Clerk: Shall I assign them a Plaintiff's number?

Plaintiff's number 12 for identification.

(Plaintiff's exhibit 12 marked for identification.)

Mr. Kramer: That would be defendants', would it not?

The Court: We want his to have them identified.

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There is no indication that they will be introduced into evidence. In the event they are, we can then identify them.

Mr. Kramer: May I take a look at them, too?

Mr. Zorn: Sure. Your Honor please, this is rather a voluminous set of papers which the witness has.

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Could you indulge me about five minutes so that I can look through them?

The Court: Surely.

Deputy Clerk: Consisting of 30 pages.

(A short recess was taken.)

By Mr. Zorn:

Q. You swore to an affidavit in this case, did you not, on November 19, 1962? A. That is my signature.

Q. Is that your signature? A. Yes.

Q. That was in connection with proceedings in this case, is that right, the motion for a preliminary injunction? A. Yes.

Q. I direct your attention to this language in your affidavit. I quote it to you.

"The defendants have advised affiant and several local chairmen that they would not hire any additional personnel to be assigned to the ranks of firemen, and in fact have not hired any additional firemen since

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about July, 1959."

I ask you now whether that is a true statement, and whether it is the fact to your knowledge that Southern has not hired any additional firemen since July of 1959?

A. As far as I know, the men hired since 1959 are men that held rights on other seniority districts.

Q. I am not asking you about men on other seniority districts. I am asking about new employees, which is what I think Judge Walsh was interested in finding out about. You have sworn on oath that since July of 1959

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no new employees have been hired as firemen. Is that correct? A. As far as I know, there has been none hired except from other seniority districts.

Q. I am talking only about newly hired employees and only that, Mr. McCullum, and we will get along more rapidly. A. What do you call newly hired employees?

Q. Someone who has never worked for Southern before. A. I think that is right.

Q. All right.

Now, in the yellow sheets that you have here, plaintiff's exhibit 12 for identification, I assume that these sheets with names and dates, these dates alongside the names, are the dates when, on the basis of your testimony here,

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you say these men have been hired by Southern, is that correct? A. That is right.

Q. Let me direct your attention to some of your notes here, Mr. McCullum. You have some names, for example, S. A. Jackson, 621-60.

On this page you have the names of at least five men hired in either 1960 or 1961. Now, can you explain that?

A. When this question came up yesterday in Court, I made a statement as to the number of firemen the Southern had employed since the first diesel agreement became effective May 11, 1944.

After court adjourned, I was asked about the number since June, 1950—well, let us see, May 17, 1950, the date of the revised diesel agreement. I called on the carrier for copies of the seniority list which they were not able to supply.

I called the secretary at home, at Tuscumbia, and she read these names off of seniority lists to me. Now, we

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have the seniority list this morning that was furnished by the carrier at 9:30?

Q. You do? Have you had a chance to examine those?
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A. Well, we have not had time to compare every name with these.

Q. Well, the fact is at your request the defendants have supplied you seniority lists which you have not checked in connection with the testimony you gave just a short time ago, is that correct? A. The seniority list that they furnished me will be the same that these names came off of, except they are revised.

Q. That is not my question. My question is a very simple one. Did the carrier furnish to you seniority lists this morning, did you check those seniority lists personally with any care, in order to arrive at figures to which you have testified here in court? That is my question. A. I have not checked the lists that were furnished me at nine-thirty this morning for every individual name.

Q. So that the information that you have testified to, when you made your summary here, which appears on this first white sheet on plaintiff's exhibit 12, with respect to the numbers of firemen hired each year and a total of 259, did you understand that you were being asked how many new employees who had not previously been hired as firemen, were employed by Southern in each of those years?

Did you understand that? A. This is the list of all men
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that has been employed since May 11, 1950.

Q. Let me try again: Perhaps if you will listen to my question— A. What was your question this morning?

Q. My question is, did you understand that you were

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testifying here this morning when you gave these figures, to new employees hired by Southern in each of the years since 1950, who had not previously worked as firemen for Southern? A. The list and the summary I gave this morning included all men hired since May 11, 1950.

Q. Well, now, let us get down to—Mr. McCullum, this: Isn't it a fact when you go through your sheets here and on almost every single one of them you have what appear to be hiring dates in 1960, 1961 and 1962? Is that not correct? If you look through those sheets, is not that correct? A. They were not included in the total number of 250.

Q. They were not? A. No. It says right here, it says January to April, 1960.

Q. January to April, 1960, fifteen. A. We did not count these.

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Q. No, I do not think you understand my question. My question comes down to this: Your seniority list would show, would it not, that when you have a hiring date in a particular division, that hiring date which appears on the seniority roster could be a man who was transferred from a totally different division?

In other words, if a man were transferred from the City of Washington to the Danville Division, it would appear on the seniority list as a hiring date as of the time of the transfer, is not that correct? A. Well, your reference to transfer is incorrect. I do not know what you are talking about.

Q. Could you let me look at the seniority lists that were supplied to you by the carrier this morning?

Do you have them available?

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Mr. Kramer: I do not think so. Do you have them?

The Witness: No.

(Mr. Gilbert supplied the documents.)

By Mr. Zorn:

Q. Well, now, just for the sake of example, let us take the seniority roster for the Charlotte division dated January 1, 1963: And I direct your attention for example, to page fifteen. This will appear on other pages.

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At the end of that page it shows seniority dates for a number 4 K. T. Weaver, 2-2-61. Then there is an asterisk. Then R. T. Wittmeyer, 7-24-61. Also an asterisk.

And 7-6, C. C. Broom, 7-23-61, also an asterisk.

Mr. Kramer: Your Honor, I want to object to testimony about anyone hired after April, 1960. Mr. McCullum on direct examination did not say a word about any hiring after April, 1960. His testimony ended then.

The Court: Obviously the Court is concerned with that question. The Court understands from the witness on the stand that October 10, 1960, he discussed with Mr. Tolleson, representing the Southern Railway, the fact that they would no longer hire new employees in the firemen craft.

Is that your understanding of his testimony?

Mr. Kramer: My understanding is that Mr. Tolleson said it somewhat earlier, in July.

The Court: July of 1960.

The Witness: Yes, sir, 1960.

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The Court: Obviously the Court is concerned and interested. So, if no one else would ask the question, the Court would ask the question.

Mr. Kramer: About whether employees were hired after that period?

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The Court: Certainly.

By Mr. Zorn:

Q. I direct your attention further to the footnote explaining the asterisks on this document which I will show you.

“Seniority Date Prior to 1950 on another Roster.”

Now, you know how these seniority rosters are made out. Is it not a fact that on the seniority roster that you look at, those which the company, the defendants prepared, you have dates of service on divisions, and if a man had been on the Danville Division for ten years, had started work as a new man in 1950, if he transferred to the Washington Division in 1960, he would appear on the Washington division's seniority list with a date 1960; is not that so? A. No, sir.

Q. It is not? A. A man is transferred for temporary service, that does not establish a date on that division.

Q. How can you possibly explain to the court then, Mr. McCullum, all of these seniority dates in 1960, in 1961, in 1962, on the seniorities' roster, unless they were men who were previously employed in earlier years and transferred to another division? How can you possibly explain

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that? A. Will you do that over? You keep talking about transfers. No transferred men establishes date of seniority.

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Q. Let us take Mr. Weaver who appears on the seniority roster of the Charlotte Division, seniority roster of January 1, 1963 which is the document I am showing you. Mr. Weaver's seniority date on that document is 2-2-1961.

A. Yes.

Q. Do you know Mr. Weaver? A. No, sir.

Q. You have already testified, have you not, that ever since July of 1959 the defendants did not hire any new employees as firemen, right? A. Yes, that is right.

Q. Now, are you trying to tell the Court here that despite that testimony, the carrier hired Mr. Weaver in February of 1961 as a new employee, that it hired Mr. Wittmeyer in 1961 as a new employee, and hired Mr. Broom for 1961 as a new employee?

Mr. Kramer: I must renew my objection. He did not testify about anybody being hired in 1961.

The Court: Let me ask you this, Mr. Kramer, can you help the Court out any?

Mr. Kramer: I will try to.

Mr. Zorn: Your Honor, I think we can clarify this
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very quickly.

The Court: Well, the court feels that the cross examination is entirely proper.

Now, if the witness does not know the answer, all he has to do is say "I do not know the answer."

The Witness: I know the answer.

Mr. Zorn: I would like to ask Mr. Kramer if he would be willing to stipulate to this: That on the seniority rosters produced by the company, and on the work sheets and figures which Mr. McCullum used here for the purpose of testifying to numbers

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of people hired in 1950, 1951, 1952, right down through 1959 and part of 1960, that those figures included the names of men who had worked for Southern in many instances, for many years as firemen, and that on the seniority rosters they appeared under the dates, and that Mr. McCullum's compilation includes within it, as new hires, men who have previously worked for Southern.

Mr. Kramer: The years 1950, 1951 and on through? I can't stipulate that. I do not know that is so.

Mr. Zorn: I think we will have to have a long cross examination on this because that happens to be the fact.

The Court: All right.

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By Mr. Zorn:

Q. Which division are you most familiar with, Mr. McCullum? A. Memphis.

Q. The Memphis Division? A. Yes, sir.

Q. Is there any other division that you are reasonably or quite familiar with? A. In what respect?

Q. Do you know men as part of your organization? A. I know some men on every division.

Q. Would you do me a favor and go through these various seniority lists and pick out for me, if you will, the one referring to the Memphis Division? A. Well, it says Memphis on the front of it.

Q. All right.

Mr. Zorn: Shall I mark these for identification, your Honor?

The Court: All right.

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Deputy Clerk: Defendants' exhibit 21 for identification.

(Defendants' Exhibit 21 is marked for identification.)

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By Mr. Zorn:

Q. Mr. McCullum, I show you defendants' exhibit 21 for identification which is the seniority roster for the Memphis division, January 1, 1963. I ask you whether you know a man named G. N. Rutland, whose seniority date on the Memphis Division Roster appears as December 18, 1962? A. I know him.

Q. How long has that man actually been a fireman employed by Southern Railway? A. Could I make a statement about this?

Q. Just answer my question, please. A. September 10, 1945.

Q. 1945. Now that would be equally true, would it not—not equally true, I withdraw that question.

On the defendants' seniority roster of the Memphis Division and the same appears as you have seen it, Mr. McCullum, on other divisions, you have numbers of men who, on different divisions have seniority dates in 1962, in 1961 and certainly in the later half of 1960, is that not true, as they appear on the seniority rosters? A. If they are on there, they are on there.

Q. Yes, and wherever, in view of your testimony that no new employee has been hired as a fireman since July of 1959, when dates appear on the seniority roster along—

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side the names of men showing seniority and seniority dates on respective divisions as being during the year

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1962, the year 1961, and the year 1960, wouldn't all those men have been men who were employed before those dates? In many cases years before those dates? A. That has already been established.

Q. And don't your records, from which you compiled the figures that you testified to this morning, include seniority dates at least for the years—now, I am not talking about 1962, and I am not talking about 1961 nor 1960 but when you talk about the number of hires in 1959 for example, would the number of hires you testified to, for example, Mr. McCullum, looking at your notes, you say that there were 27 men employed in 1959. Now, did that 27 include men who had previously worked for Southern on another division, or did they not? A. I did not check each individual. The majority of them certainly did not. Now, there may be one or two of them that did.

Q. Now, on your very own notes, your handwritten notes, Mr. McCullum, on plaintiffs' exhibit 12, you have this notation: January-April, 1960, 15. And then you have, beginning with 1950, the numbers of men alongside each year and for January and April, 1960 you have 15 men.

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And then on your own notes you have an overall total for all of these years of 259. Is that correct? A. Yes.

Q. And you know, and you have testified that no men were employed—no new men were employed as firemen by Southern in the year 1960; is that not the fact? A. These men that are listed after that date were men that were employed from other divisions.

Q. Oh, I see, and the same thing then would also be true, would it not, with respect to the number of men you have included with dates beginning in 1950? A. No, sir.

Q. For example, in 1950 you have a figure of 53, is that correct? A. That is right.

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Q. Will you tell me now precisely what document you used to get that figure of 53 men for 1950? A. The seniority list just like this dated July 1, 1962.

Q. You did? A. Yes.

Q. Would that seniority list also indicate, as these other lists indicate, that men given particular seniority dates in 1950 or 1951 or 1952 or 1953, on a particular division,
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were not new employees at the time but had been employed on some other division before that time? A. No, sir—it would not show that.

I wanted to clear something for the Court awhile ago, and you would not permit me.

Q. Your attorney can bring that out. You just answer my questions unless the Judge is interested.

The Court: Wait just a moment. Do you want to explain an answer?

The Witness: Well, the thing that he is driving at is not absolutely right, because this does not appear on the ordinary seniority list. I have never seen it before. Evidently the carrier did this last night in developing information for Mr. Zorn, because this is not ordinarily and never has been shown on a seniority list.

Mr. Kramer: When you say "this," will you say what you are talking about? What is "this"?

A. Mr. Zorn has been referring to certain names followed by an asterisk.

Mr. Kramer: Is the asterisk what you were talking about?

The Witness: The asterisk at the bottom says, "Seniority date prior to 1950 on the seniority roster."

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It is my considered opinion this was added after these lists were received in Washington by the carrier in developing information for their counsel. Because that is not shown on any seniority list, it never has been shown on a seniority list.

Mr. Zorn: Mr. McCullum, you happen to be entirely correct, because I asked the carrier to indicate on seniority lists a distinction between the men who were employed for the first time and the men who had been employed before in connection with the seniority dates given. You are entirely correct.

I am simply asking you this basic question and that is, that on the seniority list you used for the years in question men who appear on a seniority list of a division for a particular year, and you have taken that in your compilation as a man employed in that year, is that correct, with regard to that whether it be 1950 or 1951?

The Witness: In this period that we used from June, 1950 to April, 1960, the majority of those—I would say all except a very few, maybe a dozen—had never had service with the Southern in any capacity prior to that time.

Q. Well, can you—that is a nice general statement, Mr. McCullum—but can you give us now the name of every

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man that you have included in your overall total of 259 who had never theretofore been employed by Southern as a fireman? A. I could do that if the Southern has placed it, the asterisk in the right place.

Q. Just to illustrate and see if we can get together on

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this thing, because we are spending a lot of time— A. You are spending the “lot of time.” You started out with Mr. Weaver awhile ago and dropped him when you were getting to what you wanted.

Q. Well, can we move to strike that remark?

The Court: It will be stricken.

By Mr. Zorn:

Q. Here is the seniority roster of the Danville Division for January 1, 1963 which was submitted to you by the carrier this morning, and that lists Mr. I. L. Burton with a seniority date of July 29, 1942, is that correct? A. That is right.

Q. Now, I show you—do you know what happened to Mr. Burke? A. No, sir.

Q. Let me show you the seniority roster for the Winston-Salem Division, also of January 1, 1963 and under No. 18 is the name I. L. Burke. His seniority date as a fireman is listed there as October 1, 1962 with an asterisk. A. Yes.

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Q. Well, on the basis of that, would it not appear that Mr. I. L. Burke started as a fireman, as a new employee at least as far back as 1942, but yet if you eliminate the asterisk and the rest would appear that he was hired in 1962 on the Winston-Salem Division? A. Now, do you know that that is the same I. L. Burke?

Q. I am asking the question, sir. A. I do not know that it is the same one.

Q. You just answer the question. A. What do you want me to answer?

Q. You do not know Mr. Burke? A. No.

Q. I want to ask you this question, then I am going

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to drop this: Are you ready to swear under oath here that every single man that you have included in the compilation which you gave in response to Mr. Kramer's questions, for example, 1950, 1953, 1952 and 1948 and 1951, 21, are you prepared to swear under oath that each and every one of the men included in those totals was hired as a new employee for the first time in those years? A. Excluding Mr. Burke. That would leave 258.

Q. You swear under oath that, on the basis of your knowledge, that every one of these men who were included in these totals is a man who was hired for the first time in

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the years that you have and was not previously an employee of the railroad? A. You mean section man, or what, when you say employees.

Q. As firemen. You understand what I mean? A. Firemen.

Q. Yes. A. I had previously explained to the Court that I did not check each individual, whether or not he had been previously employed by the Southern, from this list, between June, 1950 and April, 1960. There may be two or three of them in there out of 259.

Q. Now, your explanation is that in fact, the asterisk, which appears on the seniority roster submitted to you, indicates the man had previously worked on some other division when his seniority date is given on the list? That is the explanation the railroad made to you, right? A. That is right.

Mr. Zorn: At this time, may I offer in evidence—

The Court: In order to keep the record straight, I think you had better identify those references that were made to specific divisions.

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Mr. Zorn: I can do that in this order. I will have them marked in order.

Deputy Clerk: Defendants' exhibit 22 for identification, the Charlotte Division.

(Defendants' exhibit 22 marked for identification.)

Deputy Clerk: Exhibit 23 for identification is the Danville Division and Defendant exhibit 24 for identification is the Winston-Salem Division.

(Defendants' exhibits 23 and 24 marked for identification.)

Deputy Clerk: Exhibit 25 for identification is the Washington Division. Defendants' exhibit 26 for identification is the Columbia Division.

Defendants' exhibit 26 for identification; Defendants' exhibit 27 for identification is the Charleston Division.

Defendants' Exhibit 28 for identification is the Asheville Division.

Defendants' Exhibit No. 29 for identification is the Knoxville Division.

Defendants' Exhibit No. 30 for identification is also Knoxville Division, Appalachian—

Mr. Zorn: Yes, that is right.

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(Defendants' Exhibits 25 to 30, inclusive are marked for identification.)

Deputy Clerk: Defendants' exhibit 31 for identification.

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Defendants exhibit 32 for identification is the Atlanta Division, Atlanta Terminal.

(Defendants exhibits 31 and 32 are marked for identification.)

Deputy Clerk: Defendants exhibit 33 for identification is the Birmingham Division.

Defendants exhibit No. 34 for identification is Mobile Division.

Defendants exhibit No. 35 for identification is St. Louis and Louisville Division.

Defendants Exhibit 36 for identification is C & O & T-P Railway Company.

(Defendants exhibits 33 to 36, inclusive, marked for identification.)

Deputy Clerk: Defendants exhibit 37 for identification is Chattanooga Terminal and C & O and T-P Railway.

(Defendants Exhibit 37 marked for identification.)

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Deputy Clerk: Defendants Exhibit 38 for identification, AGS Railroad Company.

Defendants exhibit 39 for identification, N-O and N-E Railroad Company.

Defendants exhibit 40 for identification is St. Johns River Terminal Company.

Defendants exhibit No. 41 for identification is GS&F Railway Company.

Defendants Exhibit 42 is Richmond Division.

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(Defendants exhibits 38 to 42 inclusive are marked for identification.)

Mr. Zorn: Your Honor please, I would like to offer in evidence defendants exhibits 21, running consecutively through defendants exhibit 42 for identification, which are the seniority rosters as of January 1, 1963 for the various divisions of the defendants' railroads.

I offer this, your Honor, for the very limited purpose, on the issue of credibility of this witness. I do not offer it, your Honor, as bearing on any practice whatsoever in the face of my earlier objections. It is offered only for this limited purpose.

Mr. Kramer: Your Honor, first, I believe it is not complete. I believe there are two errors. I think that there is one missing, and another one of which

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I do not have a copy. But I object to their being received as the documents Mr. Zorn described. They are not just the seniority rosters of the Southern. They are the seniority rosters of the Southern with some notes made on them by someone, we do not know who.

The Court: The Court feels that the objection should be sustained. They can be identified at the proper time.

Mr. Kramer: All right.

The Court: The Court understands from the witness that is presently on the stand that the seniority rolls which he has had an opportunity to review in the past are not in the same fashion as this one.

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Mr. Zorn: Your Honor,—

The Court: So the Court feels that someone from Southern that has compiled these should identify them.

Mr. Zorn: I would like to make this statement of explanation, as I told the witness, that the form of keeping these seniority rosters in the past could not possibly have given you the information that you had requested yesterday with respect to new men, and so they had to be identified as to new—whether they were new hires or men transferred from other districts.

The Court: The Court understands that, and the
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record so reflects.

By Mr. Zorn:

Q. What was the first time you began as general chairman to complain about shortage of firemen to the Southern? A. There have been isolated cases of shortages since I began work on the railroad. The local chairman ordinarily notifies the superintendent or whomever he may designate to represent him that there is a shortage and men are employed to sufficiently fill the list.

Q. My question was when was the first time you complained? Now you could answer that, I think, very simply by giving me a date if you recall. A. Well, you would have to say in connection with something, because we have had some argument all along about it, about shortages.

Q. Well, now, let me see. Would you mark this for identification.

Deputy Clerk: Defendant exhibit 43.

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(Defendants exhibit 43 for identification is marked.)

By Mr. Zorn:

Q. Do you recall a letter that you wrote to Mr. J. K. Ford on March 9, 1960? A. I do not know a J. K. Ford.

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Q. You do not know a J. K. Ford? A. No.

Q. Never heard of him in your life? A. No, sir.

Q. Mr. McCullum, I show you defendants' exhibit 43 for identification and ask you whether that is your signature on that letter? A. That is J. M. Ford.

Q. This is a letter signed by you? A. That's J. M. Ford, though.

Q. That is J. M.? A. Yes.

Q. But you know a J. M. Ford, correct? A. Yes.

Q. I would like to ask you if this refreshes your recollection as to whether you were not complaining to Southern about shortage of firemen as far back as June of 1958? Let me read only what you said.

"Refer to your telephone conversation this a.m. relative to the question of employment of firemen as well as the immediate violation of the agreement by the carrier in operating the Lawrenceburg Local without a fireman March 9, 1960.

"The Committee has been handling the question of

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the shortage of firemen at Macon, Val Dosta, Louisville and Washington for a period of time in excess of 18 months. Your file H-291-18-58. This matter was first handled with Superintendent Stranch June 23,

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1958, and was appealed to General Manager W. H. Oglesby June 24, 1958."

A quick calculation would bring it back to about September of 1958. A. What was the date of that letter?

Q. March 9, 1960.

Now, I ask you in view of that letter, were you not as early as June or your organization as early as June of 1958, complaining to Southern Railway System over shortage of firemen? A. I explained to you earlier that we had been doing that for years; when there is a shortage the local chairman notifies the superintendent just as local chairman Clark notified the superintendent in Macon in that case.

Q. This particular letter, however, does not refer to, does it, an isolated matter? You specifically say in this matter, "The committee has been handling the question of the shortage of firemen at Macon, Val Dosta, Louisville and Washington for a period of time in excess of 18 months."

That is what your letter says. A. The local chairman

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could have been handling it with the superintendent.

The Court: Wait a moment. Mr. McCullum, the Court understands from your testimony yesterday that you went in as general chairman in 1955.

A. Yes.

The Court: For the entire division?

A. Yea.

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The Court: Or for the system?

A. Yes, sir.

The Court: Now, when was the first time that you, as general chairman, ever made a complaint in your capacity as general chairman?

A. Well, your Honor, I could not say exactly. There has been complaints all along when there is a shortage. But ordinarily up to this time when we called their attention to shortages, they employed men to fill the list. We have had the question of the employment of men on every division, as indicated by these seniority lists, every year. Ordinarily before they are employed, when the local chairman checks the mileage.

The Court: Who is Mr. Ford?

A. He is assistant director of Labor Relations here in Washington. For Southern Railway System.

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The Court: Now, this letter dated March of 1960, do you recall writing any other letter in your capacity and in your representative capacity to any executive of the Southern System pertaining to operating trains without firemen?

A. Oh, yes. Some 150 of them.

The Court: Who are they directed to?

The Witness: Mainly to Mr. Tolleson, in Washington, at that time Director of Labor Relations, now Vice President of Labor Relations.

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The Court: When was that first letter, if you can recall, about? You say you took over in 1955.

A. There has been some letters every year. I could not name all of the instances claims. We have got a docket up here now of different claims of 124 which has originated since August. I cannot possibly remember the dates of every instance.

Mr. Kramer: I believe the witness did not understand your last question. Judge Walsh is not talking about ordinary claims or grievances. I am endeavoring to help your Honor. You want to know when he wrote his first letter to Mr. Tolleson complaining of shortage of firemen.

The Court: Or any other executive.

Mr. Kramer: But only as to shortage of firemen.

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He is not talking of claims.

The Witness: Well, in connection with this current—what has built up into this current dispute, we have 27 divisions and you may write a letter about any one of those. But, in connection with the beginning of this build-up of this point, was in the latter part of 1959, possibly.

The Court: All right.

Deputy Clerk: Defendants Exhibit 44 for identification.

(Defendants exhibit 44 is marked for identification.)

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By Mr. Zorn:

Q. Following up the question Judge Walsh is asking, I refresh your recollection to complaints with respect of shortage of firemen on various divisions going back, at least according to your own letter, to June, 1958. Can you now recall any complaints which were made by your organization complaining of shortage of firemen on any of the divisions of the defendants in 1957, 1956, 1955? A. I could not give you the exact date of those. Ordinarily when this complaint is made, the superintendent employs the men to fill the list and I may never hear of it.

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Q. Talking only of the ones that you have heard of, Mr. McCullum, that is all I am asking, did there come to your attention during the years 1955-1956-1957 and 1958, complaints with regard to shortages of firemen on different divisions of the Southern system? A. Well, I would say very few.

Q. Can you tell us how many? A. No, sir.

Q. Was it or was it not your testimony that in connection with your complaints to Southern you did not understand Southern's position to be that they would not employ new firemen until I think you said the meeting of July 19, 1960, was that your testimony? A. I stated that that was the first time Mr. Tolleson made the fact plain that he did not intend to bring new firemen in, to employ new firemen, that is correct.

Q. Are you sure of that? A. Yes, sir, I am sure of that.

Q. All right, Mr. McCullum; there has been introduced in evidence here a document entitled, "Chronology of Events in Connection with Violation, Vacation, Mileage Limitation and Diesel Agreements, between BLF&E and Southern Railway System," and Mr. Gilbert, the president

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of the organization, testified that this was prepared, this chronology was prepared in his office, in the president's office, from information received by you and vice presidents of your organization. That was his testimony. You were not here when he testified to that? A. I was not here.

Q. This defendant exhibit 1, let us see if I can refresh your recollection. This comes from the Union files. It states, under Item October 2, 1959, and I quote:

“General Chairman McCullum reports that Washington Division critically short of firemen during months of July, August, September. Vacancies were filled only through violation of mileage agreement. Director of Labor Relations announces he will employ no additional firemen on Washington Division.”

That is the end of the statement from your own union files. Is that a mis-statement or a false statement as contained therein? A. It is neither one.

Q. Did Mr. Tolleson, director of Labor Relations, tell you as early as October, 1959, that the railroad would not employ new employees as firemen on the Washington division? A. Prior to—

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Q. You can answer that yes or no. A. I won't, though.

Mr. Zorn: I will ask the Court to direct you to do that.

The Court: Wait just a moment. You can answer the question. Then you can give any explanation that you care to.

A. Repeat the question.

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Mr. Zorn: Would you read the question?

(Question read.)

The Witness: He did not say no, per se.

By Mr. Zorn:

Q. Your testimony is that he did not say no per se, but the official record of your own union says unequivocally that he announced he would not employ any additional firemen on the Washington Division? A. Up to July, 1960, his actions made that very plain, but he had not said it in so many words.

Q. But you understood that he did not intend, as early as October, 1959, you have just stated that his actions made it very plain that they intended to hire no new employees as firemen. You understood—

Q. Regardless of what he said. You understood they were not going to hire any additional firemen? A. I did not know whether he was or not. Whatever this Court

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does may still determine whether he does or not.

Q. Mr. McCullum, would you try to listen to my questions. A. I am listening.

Q. Try to answer them. My question was a very easy one to answer. You testified just a moment ago that he did not quite say this per se. The statement that is recorded in an official document from your organization, that he would not employ additional firemen in the Washington Division. You said that he did not say that, per se, and then you went on to say that though he did not say it per se, you understood that that was his position. Am I correct on what you have just testified to? A. The Grand Lodge in compiling this chronology that you now hold did

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that on the basis of letters that I wrote them, and it is—this position was derived from my feelings in connection with the conference with the carrier, that they did not intend to employ new firemen.

Q. So that, whatever Mr. Tolleson may have said to you, you reported to the Grand Lodge that you understood or interpreted Tolleson's position to be as early as October of 1959 that they would not hire additional firemen on the Washington Division, is that right? A. That was based on the fact that he had not—

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Q. Again referring to your earlier testimony that for the very first time you were told that Southern would not employ any additional firemen until, I think you said, until July 9, 1960, let me read you an item in this same chronology taken from the records of your own organization and as you have testified, based in good part on information that you supplied him. Defendants' exhibit 1, and I quote this:

Under date of May 13, 1960.

"And I am quoting this— "Conference held in Washington, D. C. between representatives of the BLF&E and Southern Railway to discuss violation of Section IV of the Diesel Agreement and the general problem of the insufficient number of firemen at certain points on the Southern system. The spokesman for the carrier took the position that (1) everything possible was being done to get furloughed firemen to return to work from other divisions;

(2) No new firemen would be employed.

(3) No service would be tied up when firemen were not available."

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That is the end of the quotation from this defendants exhibit 1, this chronology, and I ask you whether you would now like to change your testimony with respect to
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being advised for the first time in July of 1960 that the defendants would not employ new employees as firemen.
A. No, sir, I would not, because the first time to my recollection, and you know that the notes we keep on conferences we go back to them—

Q. I have not asked that. I only asked if you wanted to withdraw the statement. You have said no. That is sufficient for me. If your lawyer wants to bring out anything else, that is all right. You have answered my question.

But, in any event, by May 13, 1960, regardless of anything that was said, did you not understand and report to the Brotherhood that the Southern's position was that no new firemen would be employed? A. That was reported as the basis of my personal understanding of what the intent and results of our conference were.

(Conference at the Bench.)

The Court: Mr. McCullum, the Court understands that you are not too familiar with procedures in Court. The Court wants to advise you that there is nothing mystic about a lawsuit, about proceedings in Court. Do you follow me?

The Witness: Yes, sir.

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The Court: In other words, this court room belongs to you, and it is a place where you can come and testify. Now, all we want are the facts, do you follow me?

A. Yes, sir.

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The Court: And you happen to be in a position where you know a great many of the facts. Do you get my point?

A. Yes, sir.

The Court: So there is nothing mystic about it. You can be just as informal as you care to be. If you do not understand the question, ask for the question again, tell him you do not understand it. Do you get my point?

A. Thank you, sir.

By Mr. Zorn:

Q. I want to try to help refresh your recollection with respect to Southern's position about hiring new employees as firemen, and how early that took place.

I show you defendants exhibit 2 which is a letter from you to Mr. Gilbert, president of your organization.

Do you recall that letter? Is that your signature?

The Court: Keep your voice up now, so we can all hear you.

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A. Yes, that is my signature. What was the date of that?

By Mr. Zorn:

Q. Oct. 2, 1959.

In this letter you say, "Local Chairman Swan advised me this date"—which I take to be Oct. 2, 1959—"that the situation is now fairly well in hand because vacations have been completed and sufficient men are

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available. However, in view of the fact that Mr. Tolleson advised me in conference that he did not intend to employ additional firemen on the Washington Division, and he further stated that the organization had no right to make a grievance when firemen were not available, it is evident that we will have to take stern action to settle this matter."

I want to ask you whether this refreshes your recollection to the extent that, as early as October 2, 1959, and not in July of 1960, Mr. Tolleson had already advised then that he did not intend to provide or to employ additional firemen on this Washington Division. A. The Washington Division is just one division of the Southern.

Q. Would you try to answer my question? A. Mr. Zorn,
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prior to this meeting with Mr. Tolleson, he had suggested we consolidate the seniority list of the Danville and Washington Divisions because they had a surplus of some 90 cut-off men on the Danville Division which adjoins the Washington division running south.

We discussed the consolidation of these, but we did not reach agreement on consolidation, but we did finally come up with the agreement made April 1960 which provided the Danville men could be employed on the Washington Division.

Q. Now, Mr. McCullum, just check your recollection a moment. The agreement with respect to the modification of seniority was executed or signed April 22, 1960. Is that not correct? A. Yes.

Q. March of 1960, March 24 and March 25, 1960, you and Mr. Mitchell, a vice president of the Brotherhood, met with Mr. Tolleson and at that time discussed this problem of a modification or change in the seniority rules with re-

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spect to a man who stood for service in another division not forfeiting seniority in his home district. Does that refresh your recollection as to dates? A. Yes, sir, but you misrepresent that as referring to it as modification.

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It is a new rule, because the men were never permitted to do that prior to April 22, 1960.

Mr. Zorn: I move to strike that answer. It is completely unresponsive. Could I ask your Honor that this witness be directed to answer the question.

The Court: It will be stricken. Just try to answer the question, Mr. McCullum.

The Witness: Thank you, sir.

By Mr. Zorn:

Q. Now, on date Oct. 2, 1959, at that time you reported to Mr. Gilbert that Mr. Tolleson had advised you, in conference, that he did not intend to employ additional firemen on the Washington division, and I asked you whether that was an actual and accurate statement you were making to the president of your organization? A. That is accurate. He had agreed to employ men off the Danville division or other divisions where there was a surplus of firemen.

Q. He told you, then, where there were surplus firemen, these would be furloughed firemen, right? A. Yes.

Q. As I understand your answer, what Mr. Tolleson said to you was that the railroad was perfectly willing, or wanted to employ furloughed firemen from another division if there were a shortage, is that correct? A. He used the word "wanted to," a little loosely. He agreed to do it.

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Q. As a matter of fact, subsequently in 1960 and the early part of 1960, wasn't it Mr. Tolleson who made the

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suggestion, you can call this a new rule if you like, I am not interested in terminology—it was Mr. Tolleson, was it not, who made the suggestion initially that either a modification or a new rule or however you choose to call it, should be worked out so that a man who stood for service in another division would not lose his seniority in his own division? A. The first suggestion made by Mr. Tolleson was to consolidate the two lists, and that involved things of making men leave home, that we did not reach an agreement on.

Q. Well, you see, I want to try, if I can, to try to get certain dates straight, Mr. McCullum.

I show you a copy of a letter dated December 4, 1959, addressed to you, and signed L. G. Tolleson. It may be a little difficult to read but is this the letter you are referring to where Mr. Tolleson first made the suggestion with respect to consolidation of seniority rosters? A. That has reference to the subject matter. But I could not say that that is the first.

Q. We have correspondence if necessary. I want to get your best recollection, that Mr. Tolleson on or about December, 1959 made a suggestion for consolidation of sen-

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iority rosters of the various divisions. Subsequently, you and Mr. Mitchell, vice president of your organization, met with Mr. Tolleson in March of 1960, and, as a result of that conference, there was an agreement made that a fireman who stood for service on another division would not, as the previous rule or agreement provided, forfeit the seniority in his home district or home division, right? A. Your question is not clear.

Q. Read it, please.

(Record read.)

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Q. Do you understand it now? A. Yes, but it does not mean anything. How is he going to forfeit it? You did not say what he is going to do to forfeit.

Q. All right, Mr. McCullum. Did you in April of 1960 reach an agreement and sign an agreement dealing with the problem of a man's seniority when he stood for service on a division other than his own division? Did you reach such an agreement? A. Not as you refer to it.

Q. I show you defendant exhibit 4, Mr. McCullum, and ask you whether this is the agreement you reached after the discussions that you and Mr. Mitchell had with Mr. Tolleson in March of 1960? A. This is the agreement.

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Q. Now, coming back to your letter to Mr. Gilbert of October 2, 1959, after referring to his statement that I have already asked you about, that he did not intend to employ any additional firemen on the Washington Division, you go on in that letter and say this:

"And he further stated that the organization had no right to make a grievance when firemen were not available. It is evident that we will have to take stern action to settle this matter."

I would like to ask you what was the nature of the "stern action" you had in mind when you wrote this to Mr. Gilbert?

A. This is a good example of it.

Q. Were you contemplating a strike at that time? A. We were contemplating following the provisions of the Railway Labor Act.

Q. You did subsequently call a strike, did you not? A. Yes.

Q. In July of 1960. A. Yes.

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Q. Right? A. Yes.

Q. In this statement in this same letter, you said to Mr. Gilbert, "A conference date is being requested with
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Mr. Tolleson to discuss this matter and I am requesting that you assign an officer to assist our committee to handle this matter to a conclusion. The Washington Division was critically short of firemen during the month of July, and August and September. At times we need at least 9 men to fill vacancies."

That is what you said to Mr. Gilbert. A. That is right.

Q. Now, from the nature of the statements you were making to Mr. Gilbert, first that Mr. Tolleson had told you he would not employ any new employees as firemen on the Washington Division, and your remark that "stern action was called for," you apparently regarded the situation as it existed at that time with respect to a shortage of firemen as being quite serious or very serious, is that right? A. The law provides that certain things be done in order to handle a movement, and possibly could have been trying to impress the Grand Lodge that—let's move along a little faster, you are not helping me enough in this thing.

Q. Well, unless you thought the situation was pretty serious, you were not going to try to push the Grand Lodge along to do something, were you, unless you yourself thought it was serious? A. Mr. Zorn, the repudiation of an agreement is a serious thing. I do not care who does it.

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Mr. Zorn: I move to strike out the witness' reply.
The Court: It is stricken.

Can't you answer the question? Didn't you think it was it critical situation?

A. Yes, it was.

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The Court: All right, that is the answer.

Mr. Zorn: Mark this, please.

Deputy Clerk: Defendants' exhibit 45 for identification.

(Defendants' exhibit 45 marked for identification.)

Deputy Clerk: A copy of a telegram.

Defendants exhibit 46—copy of a letter.

(Defendants exhibit 46 marked for identification.)

By Mr. Zorn:

Q. I have just asked you about a letter of October 2, 1959. I now show you defendant exhibit 45 and ask you whether this is not a telegram—pay no attention to what is underneath; I am talking only about your telegram and not the handwritten notes—whether this is not a telegram you sent to Mr. Tolleson on or about March 9 or 10, 1960? A. That is right, Mr. Zorn, and this was done in an all-out effort to dispose of this case.

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Q. I just asked you whether you sent this telegram. A. I did.

Q. Listen to me, please, because that will save us a lot of time. I show you a document dated March 12, 1960, defendants exhibit 46 for identification, and ask you whether this is not a copy of the letter Mr. Tolleson sent to you in reply to your telegram of March 10? A. That appears to be it.

Mr. Zorn: I offer this in evidence.

Mr. Kramer: Let me see it.

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(Document handed to counsel.)

Mr. Zorn: Your Honor, may I at this time offer in evidence defendants exhibit 44 for identification, 45 for identification and 46 for identification.

Mr. Kramer: No objection.

The Court: They will be received.

(Defendants exhibits 44, 45 and 46 received in evidence.)

Mr. Zorn: May I see those, please?

By Mr. Zorn:

Q. Just to get our sequence of dates straight, you had wired Mr. Tolleson on about March 10, 1960, in a telegram in which you said or pointed out the necessity for a conference, the situation is serious, sufficiently important for
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immediate conference; please advise promptly immediate date that you or staff member can meet us to propose the matter."

Did you subsequently have a conference with Mr. Tolleson on or about March 24 or 25th, 1960? A. Yes, it was in the latter part of March.

Q. There has been admitted into evidence a letter which is defendants exhibit 3 from Mr. W. E. Mitchell, who is vice president of your organization, is that correct? A. Yes.

Q. Addressed to Mr. Gilbert, in this letter, the letter dated May 19, 1960, but he is referring to the conferences in March, particularly the conference of March 25, is that correct? A. Yes.

Q. According to this letter, Mr. McCullum, Mr. Mitchell,

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and you met with Mr. Tolleson in his office in Washington on March 25, 1960, right? A. Yes.

Q. Mr. Mitchell in this letter reports to Mr. Gilbert that "reference is made to Mr. Gilbert's letter of October 6, 1959, accompanying Grand Lodge Temporary File in connection with the dispute between our general grievance committee and the Southern Railway Management, involving the carriers' refusal to hire sufficient firemen (helpers) to

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protect the needs of the service."

Would you agree with that statement of Mr. Mitchell which he made to Mr. Gilbert? A. That is right.

Q. Now, Mr. Mitchell in this letter—and I want to ask you whether or not Mr. Mitchell was reporting fairly and accurately to Mr. Gilbert when he says, "There exists a shortage of road firemen, (helpers) on a number of carriers' divisions, particularly on the Washington division, thus they are required to exceed their mileage limitations, are deprived of their vacations, and so on, which subject Brother McCullum has handled with the carrier requesting that sufficient men be hired to properly operate provisions of the firemen, helpers, schedule agreement, which the carrier has declined to do."

That is the end of the quotation. Is that an accurate report? A. They still decline to.

Q. Just that we have our dates right, here Mr. Mitchell is reporting to Mr. Gilbert about a conference which you and he had with Mr. Tolleson in March of 1960, is that right? A. Yes.

The Court: At which time we will adjourn until a quarter of 2.

(At 12:28 p.m. recess was taken until 1:45 p.m.)

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AFTERNOON SESSION

(Pursuant to recess, the hearing was resumed at 1:45 p.m.)

Thereupon RALPH LINDSAY MCCULLUM having been duly sworn, resumed his testimony further as follows:

Mr. Zorn: Your Honor please, we are trying to do some streamlining here and we can dispose of—we will put in exhibits by stipulation. That will take us just a couple of minutes, your Honor.

The Court: All right.

Mr. Zorn: Your Honor, while the exhibits are being marked, so as to save a little time, I may as well proceed with Mr. McCullum.

Cross Examination by Mr. Zorn (resumed):

Q. Mr. McCullum, you recall that in your letter of October 2, 1959, to Mr. Gilbert, which is defendants exhibit 2, you indicated to Mr. Gilbert that it was evident that you would have to take some stern action to settle the matter.

Now, you have also testified the meetings which took place subsequent to Oct. 2, 1959 and the meetings of March 25, 1960. Now, during that period of the early part of 1960, was the situation from your point of view, with respect to

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your claimed violations by Southern, a very serious one?

A. Yes.

Q. There is a letter in evidence, Mr. McCullum, Defendants exhibit 8, dated June 17, 1960, from Mr. W. E. Mitchell

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to Mr. Gilbert, in which he refers to, he talks with you in his follow-up of this situation and he says—and I quote:

“I suggest that Brother McCullum prepare a strike ballot to the members of the General Grievance Committee pursuant to our laws outlining this situation, and if the committee approves the fixing of a strike, in order to further prosecute this matter, that same be authorized by you. It is by now apparent that this most serious situation will not improve and I feel sure the carriers’ adamant refusal to hire firemen will not be changed short of a strike threat. Thus, under these circumstances, we can do nothing more.”

I simply want to ask you, Mr. McCullum, whether you agree with Mr. Mitchell at that time concerning his statements or advice to Mr. Gilbert? A. Certainly that was the impression left with me by Mr. Tolleson.

Q. Perhaps I had better reframe the question if you
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did not understand, Mr. McCullum. Did you agree with Mr. Mitchell, the vice president, that the situation was so serious at the time that your organization should take a strike ballot and carry on a strike threat against the Southern Railway System? A. Following the procedure of the Railway Labor Act, this is necessary in most cases to get mediation. The Mediation Board took jurisdiction after that was done.

Q. Are you suggesting by that answer, Mr. McCullum, that the strike threat was not serious, that you did not intend to go through with it? A. No, I am suggesting that we followed the law as close as we could and made every effort possible to dispose of this matter short of the action here today.

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Q. But you did take a strike ballot, did you? A. At the time, yes.

Q. Do you recall when you sent that strike ballot out? A. It was a few days prior to the date set to strike which was July 26, 1960.

Deputy Clerk: Defendants exhibit 62 for identification.

(Defendants exhibit 62 marked for identification.)

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By Mr. Zorn:

Q. Under the laws of your organization, your strike ballot goes to local chairmen, right? A. Yes.

Q. Your membership, the men who work on the lines, the rank-and-file employees, although some local chairmen may work on it, there is no provision that the men who are to be called out on strike themselves vote on a referendum to strike, is that correct? A. They do not vote on a referendum.

Q. In this particular situation when you took that strike ballot in 1960, that was taken by a vote of the local chairmen? A. Right.

Q. Was it by written ballot? Did they return ballots? A. That is right.

Q. Just to identify the date, I show you document—defendants exhibit 62 for identification, dated June 27, 1960, and ask you whether that is a true copy of the ballot which was sent out on that date to the local chairmen constituting your general grievance committee on the Southern Railway System? A. That is it.

Q. So I gather then that by June of 1960 this situation

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of your claimed violation by Southern had become sufficiently serious in your judgment and in the judgment of Mr. Mitchell that you were both advising President Gilbert that a strike ballot be taken, and that a strike be threatened, is that correct? A. That is right.

Q. Now, in your discussions of this problem with Mr. Mitchell who had been assigned to work with you from the Brotherhood office by President Gilbert and who is in this picture at this time, did you and he in discussing the strike ballot and the possibility of the strike, give consideration to the fact that the strike might be enjoined by the Courts? A. That is always a possibility.

Q. I direct your attention to a letter dated May 19, 1960 which is in evidence as defendants exhibit 3 from Mr. Mitchell, dated May 19, 1960, from Mr. Mitchell to Mr. Gilbert and the notation on the letter indicates that a copy went to you.

Can you tell us whether you did in fact get a copy, and that you read that letter at the time, at or about the time it was dated, after it was received by you? A. I have read it.

Q. In connection with any discussions you might have had with Mr. Mitchell about a strike or a threatened strike

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I would like to read the concluding paragraph of this letter to you. This is from Mr. Mitchell to Mr. Gilbert and I am quoting now.

"These are most decisions for General Chairman McCullum, and I can understand the pressure generated from the membership on these disputes, especially due to the national negotiations on the carriers' demands to remove the firemen from diesel electric

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locomotives in freight and yard service. However, I know of no way to bring the requisite pressure on the carrier, to force the hiring of firemen, except through the medium of the Brotherhood's strike procedure, in which event I anticipate that we will become involved in litigation and perhaps an injunction which could seriously handicap the Brotherhood in the event of a national strike over diesel electric firemen's helpers' situation."

I would like to ask you whether you and Mr. Mitchell, in discussing the problem of the strike ballot of the strike threat, did in fact discuss the effect of a possible court enjoinder or injunction upon the national situation in which your Brotherhood was involved? A. That was, I presume Mr. Mitchell's assumption.

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Q. Never discussed with you? A. Well, I do not remember of any lengthy discussions of that with Mr. Mitchell. It might have been mentioned.

Q. Did he discuss with you specifically, if you can recall, that if you called a strike on Southern and a court enjoined you, it might be a serious handicap to the Brotherhood in the event of a national strike the Brotherhood might call? Did he discuss that subject with you? A. That was mentioned, yes.

Q. Did he indicate to you how, in the event of a strike by you on Southern, and a court injunction, the national situation or a national strike would be handicapped? A. This is quite a complicated thing because of the Southern not being in the national movement, and offhand I do not know how it would complicate it nationally.

Q. All right. The record now indicates your strike ballot was sent out on June 27, 1960 and I gather from defendants

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exhibit 9, which is a telegram from Mr. Mitchell, indicating copies went to Mr. Gilbert and to you, dated July 11, 1960, that your general grievance committee had voted to call the strike, is that correct, had voted the strike? You may look at that (handing to witness a document.) A. That is right.

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Q. And would you agree with Mr. Mitchell's statement as to the reason for the strike mentioned in this telegram being "Southern Railway Management involving refusal of carrier to hire sufficient firemen to protect needs of service in order to administer and perpetuate DLF&E contracts on this property."

Do you agree with his characterization of the reason for the strike as he puts it in this telegram? A. Section IV of the Diesel Agreement provides that a fireman—

Q. That is not my question. A. Taken from the seniority ranks of firemen be employed on all locomotives.

Q. That was a very simple question. Did you agree with his description as to the cause of this—Mr. Mitchell's description, as I have just read it to you? A. Yes.

Q. I take it that you are familiar with the telegram which Mr. Gilbert sent to Mr. Thompson of the National Mediation Board in Washington under date of July 21, 1960, which is in evidence as defendants exhibit 10.

You may look at it (handing exhibit to witness.) A. Yes, I have that.

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Q. And I will ask you whether you would agree with Mr. Gilbert's characterization of the reason for the strike when he says, "Brotherhood of Locomotive Firemen and Enginemen has authorized strike by employees reported on Southern Railway for 6 a.m. Tuesday morning, July 26, 1960, account carrier refusing to hire firemen in order that

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diesel agreement requiring employment of firemen on diesels can be fulfilled."

Would you agree with him as to that description of the reason for the strike? A. Yes, that is right.

Q. I omitted to offer in evidence exhibit 62 for identification, being copy of the strike ballot of June 27, 1960 and I now offer it in evidence.

Mr. Kramer: No objection.

The Court: It will be received without objection.

(Defendant's exhibit 62 received in evidence.)

By Mr. Zorn:

Q. After receipt of your strike notices in July of 1960, Southern invoked mediation, did it not, under the emergency mediation provisions of Section 5, and asked the mediation board to get into the situation? A. I do not believe the Southern requested the Mediation Board to take jurisdiction

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of that. I think the Board did that on their own.

Q. I have here, Mr. McCullum, a document which is in evidence as defendants exhibit 11, being a telegram dated July 22, 1960, to Mr. Thompson, executive secretary, National Mediation Board, signed "Fred A. Burroughs, Assistant Vice President, Labor Relations, Southern Railway System."

This document also contains a certification of the Mediation Board that it is a true copy of the telegram that is in the files, and I direct your attention to the last sentence of the telegram of July 22:

"Threat of strike is not only unconscionable but illegal. Under circumstances carrier hereby invokes

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services of Mediation Board to afford it an opportunity to bring the facts to light."

Now, does that refresh your recollection, Mr. McCullum, that telegram, that it was Southern which invoked these services of the Board in that particular dispute? A. No, that does not refresh my memory, I do not have that.

Q. But despite this document, your best recollection is that you do not know who invoked mediation, or whether the mediation board did it on its own volition, is that it?

A. It was my thought now, without checking the record,

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that the mediation board came in on their own—which they have a right to do.

Q. But is it not customary, also, for a party to request a mediation board to come in or to invoke the services of the Board—that is done, is it not? A. Yes, it is done.

Q. And have you any doubt after looking at this telegram, which is certified by the Mediation Board, that Southern actually requested the Board or asked in the exact language of the telegram, "Carrier hereby invokes services of mediation board."

Mr. Kramer: I will stipulate that is an accurate copy of the telegram sent by the carrier to the National Mediator.

The Court: All right.

Mr. Zorn: That does not answer my question.

If you will stipulate that Southern invoked the services of the mediation board in this particular dispute, I will not ask the witness any further questions.

Mr. Kramer: I will stipulate that the carrier said it was invoking the services of the mediation board.

Mr. Zorn: It does not matter. The relevancy is simply that we invoked the services of the Board.

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The Court: What I mean is, what difference does

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it make whether the Brotherhood or the mediation board or the Railroad? It is like saying, "Who called the police," is it not?

Mr. Zorn: I think you are right about that, your Honor.

The Court: It does not mean that that party—

Mr. Zorn: I think you are right about that.

The Court: Right.

By Mr. Zorn:

Q. Without going into any details about it, there were several meetings with the Mediation Board over a rather long period of time, were there not? A. Yes.

Q. If your recollection is good enough on it, can you tell us when this case that we are now talking about—that was case E-240—in that case when the Mediation Board withdrew from that case E-240? A. That was June, 1962.

Q. In terminating its services in that case, Mr. McCullum, did the Mediation Board, prior to withdrawing its services either at the end of May or the early part of June, 1962, make a proffer of arbitration to your organization and to the defendants? A. Is it all right to quote the medi-

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ator the best I recall what he said?

Q. No.

I am interested in knowing, there is a statutory provision with which I am sure you are quite familiar, are you not, that in certain types of dispute, the Mediation Board before terminating its services, is required to make a proffer of arbitration to the parties? Are you familiar with that? Let me just refresh your recollection.

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Now, do you have some familiarity—I will not question you on this unless you say you have—with the procedures of the Mediation Board and generally the Railway Labor Act? A. In a general way, I do not know the thing by heart.

Q. And there is a specific provision, is there not, in section 5 First, that in certain types of disputes if the Board is unable to bring about a settlement, it shall endeavor as its final required action, to induce the parties to submit to arbitration.

That is known, is it not, as the proffer of arbitration?

A. That I understand.

Q. And with your understanding of the law, that proffer of arbitration is made, is it not, and required to be

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made, in cases where there has been no agreement on the resolution of a controversy resulting from a Section 6 notice.

Mr. Kramer: Objection. It calls for a legal opinion of this witness. He is not qualified to give it.

Mr. Zorn: I will withdraw it.

The Court: The objection is sustained.

Deputy Clerk: Defendants exhibit number 67 for identification.

(Defendants' exhibit 67 is marked for identification.)

By Mr. Zorn:

Q. There is a telegram, this is defendant exhibit 67 for identification, a telegram dated June 4, 1960, the copy we have is addressed to Mr. Tolleson, which says and I quote:

Ralph Lindsay McCullum—for Plaintiff—Cross

"Read case E-240, Southern Railway and BLF&E Board has considered report of mediator Roadley's recent handling and has authorized closing of this file as of this date. Joint, Tolleson, Gilbert. Signed E. C. Thompson."

Did you get a similar telegram or are you familiar with this telegram? A. I do not think I have seen that before.

Q. Does looking at it help refresh your recollection as to whether or not the Board, before closing its file, made

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a proffer of arbitration. A. No.

Q. It did not, or you do not remember? A. It does not refresh my memory.

The Court: Wait just a minute. Who handled the mediation, Mr. McCullum?

A. I did.

The Court: Don't you remember whether or not when they closed the case whether they made a proffer of arbitration?

The Witness: There was no formal notice made that I know of.

The Court: Was there an informal notice?

The Witness: Well, there was some discussion possibly of what question would be arbitrated, but I do not think there was a formal notice made to arbitrate. I have nothing in my files on it.

Mr. Zorn: Mark this for identification, please.

Deputy Clerk: Defendants 68 for identification.

(Defendants' Exhibit 68 marked for identification.)

Ralph Lindsay McCullum—for Plaintiff—Cross

By Mr. Zorn:

Q. With respect to the final handling of this case, Mr. McCullum, I have a memorandum, defendants' exhibit 68 for identification, dated May 31, 1962. This is a memoran-

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dum made by Mr. Tolleson. I want to read it to you and see if it refreshes your recollection of what happened.

This is the memorandum, the way it reads:

"Mediator Roadley told me on the phone today, at 11:05 a.m. that the Board will turn loose of Case E-240, and he has notified McCullum."

Mr. Kramer: I object to the reading of this unless it is identified.

Mr. Zorn: I have done that. I said this is a memorandum from Mr. Tolleson's files, prepared by Mr. Tolleson. I am asking this witness now whether or not it will refresh his recollection as to what happened on the disposition of this case before the Board closed its case.

The Court: Do you object.

Mr. Kramer: Yes.

The Court: The objection is sustained. The matter is left that Mr. McCullum does not know anything about the arbitration, is that correct, Mr. McCullum?

The Witness: That is correct.

The Court: You have never received any formal nor informal notice?

The Witness: I cannot recall any of any kind.

The Court: Well, wouldn't you recall?

The Witness: If I had received an informal notice—

Ralph Lindsay McCullum—for Plaintiff—Cross

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The Court: In other words, is it not a very important part of mediation?

The Witness: I would say yes.

The Court: All right.

By Mr. Zorn:

Q. Now, let us turn to another side of this question, Mr. McCullum: Were you advised by Mediator Roadley that, since the Board was not able to reach an amicable adjustment, it was terminating this file because in its judgment this was a matter which was referable to the National Railroad Adjustment Board as a minor dispute? A. No, sir.

Q. Do you recall that? A. No, sir, that is absolutely wrong.

Q. Now, may I read this memorandum of Mr. Tolleson to you and see if this refreshes your recollection as to what was said.

Mr. Kramer: I object. This is apparently a document Mr. Tolleson addressed to himself in which he recites what he thinks somebody told him. It is at least hearsay.

The Court: All right.

Mr. Zorn: I am not putting this in as evidence. I am trying to refresh this witness' recollection as to what was said by the mediator, because it refers to conversations with McCullum.

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The Court: The Court feels that it is objectionable.

Mr. Zorn: All right, sir.

Ralph Lindsay McCullum—for Plaintiff—Cross

By Mr. Zorn:

Q. Well, now the Mediation closed its file the early part of June, 1960, is that correct? With respect to case No. E-240, is that correct? A. When?

Q. 1962. I am sorry. A. All right.

Q. I would like to turn now for a moment to your testimony with respect to, that is your testimony on direct examination with respect to the section 6 notice which was served by your organization on September 7, 1960, and the counter proposal, Section 6 of Southern, on September 16, 1960.

You testified, I believe, that a conference, or the first conference on these proposals, these section 6 proposals, took place on October 10, 1960, is that correct? A. That is right.

Q. And you testified to some of the things that were said there. Now, in the course of that conference did you explain to Mr. Tolleson what you were seeking through this proposal, through your proposal of September 7, 1960?

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A. Briefly.

Q. I direct your attention specifically—what is the number of the exhibit? I will identify it in a moment.

I direct your attention specifically to paragraph 2 of your proposal, that is under the heading "A", this is No. 2.

Mr. Sol Kramer: It would be plaintiff's 5.

Mr. Zorn: Plaintiff's exhibit 5.

"The including engineers, firemen, helpers, conductors, brakemen, hostlers, conductors, foremen, and yard, the adequacy of the number of men in the crew and their qualifications and training."

Ralph Lindsay McCullum—for Plaintiff—Cross

Now, in explaining that, and this was a proposal for, I take it in your agreement, is that right? A. Yes.

Q. What did you tell Mr. Tolleson with respect to the firemen's organization and with respect to firemen only, what the purpose or objective of that proposal was? A. As far as the firemen are concerned in this No. 2, would be that a fireman would be employed on all locomotives.

Q. That a fireman would be employed on all locomotives,
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is that correct? A. Subject to qualification and training program that had been set out. This is nothing more than a joint notice served by all of the Brotherhood, including the engineers, firemen, brakemen, trainmen, switchmen, and for that reason other people are mentioned in there. But as far as the firemen were concerned, there is nothing in the world but that the firemen be on every locomotive the same as in our present Section IV.

Q. That is the point I wanted to get at. As far as you are concerned, this section 6 proposal filed by you would have done nothing more than have continued a rule which you had been claiming over a period of years required that a fireman be employed on every locomotive, is that correct? A. That is not correct. The carriers had previously served a notice dated November 2, 1959, having as its purpose then, you might say, cancellation of Section IV. In other words, the elimination of firemen, this was served after that notice was served. The carrier was the moving party in this case.

Q. All right. However, what you were seeking by your section 6 notice and as I understood your testimony a
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moment ago, this section 6 proposal is what you were seeking to get in a new agreement, is that correct? A. This

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notice was served because of the proposals made by the carrier in their attachment for the elimination of firemen.

Q. And you countered that then with a proposal that the rule which you said had been in existence for years should be continued, that is a rule which you claim required the hiring of firemen, the employment of a fireman on every locomotive, is that right? A. We did not say the rule be continued. The item 2 there was the rule that was requested.

Q. Mr. McCullum, I am not trying to fence with you, really I am not. I am simply saying you had a proposal from, the National proposal back from November of 1959. You filed what you say is a counter proposal, is that right?

All I am asking you is whether or not the purpose of that counter proposal was simply to carry forward what you claim section IV of the diesel agreement had meant all of the time. A. The purpose of that proposal was because the carrier served a notice November 2, 1959, to eliminate firemen in freight and yard service.

Q. And it is a fact, is it not, that Southern subsequently withdrew from the National proposal, is that right? A.

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In two stations.

Q. And Southern, on September 16, 1960, served on you a counter proposal to your proposal of September, the 7th, is that correct? A. They served a proposal.

Q. They did. And that was in response, was it not, to your proposal or counter proposal of September 7, is that not correct? A. They served a proposal. I do not know whether it is a counter or what it is.

Q. Well, wasn't this the situation, Mr. McCullum, and we will try not to be technical if we can—the National Carriers had served a proposal which, in effect, would have

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eliminated firemen from all— A. No, that is not correct.

Q. I do not mean technically right, but substantially right. A. No, that is not substantially right.

Q. Well, let me put it another way.

You have just testified that your proposal of Sept. 7 was a counter proposal to the carriers' national proposal dealing with the problem of employment of firemen, is that correct? A. That is right.

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Q. All right. So you then came along and made your counter proposal to the national carriers' proposal on that subject. A. We made a proposal.

Q. In turn Southern came along on September 16 and made a counter proposal to your September 7 proposal, is that not correct? A. They made a proposal September 16.

Q. Just to get that cleared up, I show you defendants' exhibit 15-A, which consists of, or which is a letter dated June 12, 1962 from Mr. Thompson of the Mediation Board to Mr. Tolleson, and enclosing for Mr. Tolleson's information a letter dated June 4, 1962, addressed to Mr. Thompson and signed by Mr. Gilbert, noting a copy to you.

Are you familiar with that correspondence? A. Substantially.

Q. Would you have any disagreement with the statement made by the president of your organization in this letter which he sent to Mr. Thompson of the Mediation Board which is Defendants' Exhibit 15-B, in which Mr. Gilbert said, and I quote, "As a matter of information the above quoted Section 6"—he has previously quoted Southern's Section 6 of September 16—"the above-quoted section 6 notice was served by the Southern Railway management as a rebuttal to the BLF&E notice of September 7, 1960 which

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is now in the national handling and identified as case No. NMB Case A-6700."

More specifically, Mr. McCullum, Mr. Gilbert, your president, describes Southern Section 6 notice of September 16 as a rebuttal to the BLF&E notice of September 7, 1960.

Would you disagree with that description? A. I guess he had his reason for calling it a rebuttal. I do not know what the difference would mean, whether it is rebuttal or what it is.

Q. Now, while we are on this question, in this same letter, Defendants' Exhibit 15-B, Mr. Gilbert calls the Board's attention to the fact that there had been only one conference on the property which was held October 10, 1960, to which you have already testified with respect to these two section 6 notices, is that correct? A. That is correct.

Q. And Mr. Gilbert, without quoting this, points out in the letter to the Mediation Board that since conferences have not been concluded on the property, the petition of Southern to invoke mediation at this time was improper.

That is the essence of what he is saying, is it not? A. That is correct, and what he said is right.

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Q. You do agree with your president.

Now, was this subsequently a meeting for further discussion on the property or further conference on the property set up for August 14, 1962? A. That is correct.

Q. And that had been arranged—do you recall how it was arranged? A. Well, that involved what I considered improper handling by the carrier, in that they requested the mediation board to take jurisdiction of a dispute on which we had not completed our conferences. I did not know at the time that they had asked the mediation board

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to take jurisdiction. The first knowledge I had of that was discussion of it with the Grand Lodge, at which time I was notified, and I advised them that we had not completed our conferences and technically the mediation board could not take jurisdiction. Then there was an exchange of correspondence which built up to the Mediation Board.

Q. Well, just to simplify that if we can, what you have just said all occurred prior to the time that Mr. Gilbert wrote this letter of June 4, 1962 in which he pointed out to the mediation board the conferences on the property had not been concluded, is that right? A. That is June 4, 1962?

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Q. Yes. Read the last paragraph. A. Yes. It would have had to have taken place before this.

Q. Well, all I'm getting at is that subsequent to this—by the way, was any vice president of the organization assigned to work with you on this matter, this question of the Section 6 conferences? A. Well, whatever time I get whoever is available, whoever the Grand Lodge will assign. I do not know who it will be until I get a notice.

Q. Well, is there any doubt in your mind that there was, after this correspondence between Mr. Gilbert and the Mediation Board, another conference on the property was arranged pursuant to his request, and that conference was scheduled to take place on August 14, 1962, is that correct? A. That is correct.

Q. And is it not the fact that on August 13, 1962, you advised the Southern Railway System by telegram, that you would not meet with them on August 14, is that correct? A. I advised them that I could not meet with them that day. I did not say I would not meet with them the 15th or the 16th.

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Q. Let me see. Here is your telegram, Mr. McCullum, which is Defendants' Exhibit 17 and in it, among other

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things, you said:

"I can not meet you August 14 as agreed, resuming negotiations your September 16, 1960 Section 6 notice. Why negotiate agreement when you lack honesty, decency and integrity, fulfilled present agreement. Present time can be better spent preparing strike or court action."

Signed by you with copies to Mr. Gilbert and Mr. Thompson.

That is the telegram you sent? A. That is it.

Q. You did not in that telegram say you would meet with them on the 15th, 16th, 17th or any other time, did you? A. It is not customary for conferences postponed to agree on a date that particular day, I did not know if we could meet the 15th, 16th or 17th to rearrange a date.

We have had plenty of times that he has wired me in Tuscombina that he could not meet me on a certain date. If you insist, I will have an officer assigned or if you insist I will have it some other day.

Q. Are you suggesting that you told Southern that you could not meet on August 14 because it was inconvenient, but that you might be willing to meet at some later date?

A. We did meet at a later date.

Q. I am talking about your telegram. A. We did meet at a later date.

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Q. Let me read this telegram again. See if you can answer this question.

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The Court: Wait a moment. Do you understand the question?

The Witness: Well, state it again.

By Mr. Zorn:

Q. Well, in this telegram, Mr. McCullum, you said that you could not meet on August 15 as agreed, and you went on to say, "Why negotiate agreement when you lack honesty, decency and integrity to fulfill present agreement? Present time can be better spent preparing strike or court action."

My question is, was this telegram intended to suggest to anybody on Southern that the meeting that had been canceled for the 14th would be picked up at some later date.

A. Absolutely. We know that you cannot do it, do the things that are suggested in there until you have completed your handling under the Railway Labor Act.

Q. Mr. McCullum—

The Court: Wait just a moment. Mr. McCullum, do you suggest that in that telegram, you sent that telegram?

A. Yes, sir.

The Court: That you could not meet on August 14,
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but that you were willing to meet at a subsequent date with them?

A. I knew when I sent the telegram, as we all know, that we have got to meet some time to compose a matter. But do you know why this telegram was sent? Would you like to know?

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The Court: No, the question is, are you insinuating in this telegram that you are going to meet with Southern, of your own accord, at another date? In other words, that the date of the 14th is canceled but you would like to have a meeting at some other date

A. It would be necessary that we have a meeting at another date.

The Court: All right.

The Witness: All we have to do is arrange it. We arranged it.

The Court: Now, you state in the telegram, "Why meet," did you not?

A. Yes, sir, that is right.

The Court: What did you mean "Why meet?"

The Witness: Your Honor, there is a lot of people that do not understand the amount of steam and so forth that has been built up over this on my part, because of the meeting that you held over the country and they said, "We have got an agreement that says

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so and so." why aren't you having it put into effect? The week that we were supposed to meet, just prior to this week, they operate a train right out of my—where the fellows can kick you right on the shins, right where I live, without a fireman for five days. That was the reason the wire was sent.

The Court: Yes, isn't it a fair inference to be drawn by the Court that at the time that you sent that telegram that you certainly did not want to meet with Southern on the 14th or any other day so far as you were concerned?

Ralph Lin.'say McCullum—for Plaintiff—Cross

The Witness: I am sorry if you draw that inference of what is said.

The Court: Well, just as you say, Mr. McCullum, that generated quite an emotion. Wasn't that telegram sent at that particular time with that in mind?

The Witness: I believe the 13th was on a Friday, or Saturday. Anyway, it was just the day before we were supposed to meet on the 14th. Of course, that was the exact time that all of this was brought home to me so abruptly.

By Mr. Zorn:

Q. Well, now, Mr. McCullum, in this telegram that Judge Walsh has asked you about, defendants' exhibit 17, you said, "Present time can better be spent preparing strike or court action."

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Now, as a matter of fact, this telegram is dated August 13, 1962.

Were you not in fact sometime prior to August 1962 contemplating some strike action against Southern? I am now in the year 1962, Mr. McCullum. A. Well, yes.

Q. Distinguished as from 1960. A. The strike vote was in 1960.

Q. In 1960. You have already testified to that; but I am saying that now in this telegram you refer to strike action and my question is, did you have any discussions or any correspondence of any kind with the International Office, the Brotherhood office, prior to August, 1962 with respect to another strike or strike threat against Southern? A. At the time, I do not remember any particular correspondence in that time.

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Q. Let me try to refresh your recollection. There is in evidence in this case, as defendants exhibit 14, a letter addressed to you under date of May 22, 1962, signed by Mr. Gilbert, and in that letter Mr. Gilbert says to you, Mr. McCullum, and I quote from the third paragraph:

“While considerable merit may be contained in your proposal to institute strike action”—

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Now, let me stop at that point. He is referring to correspondence with you and he is referring to your proposal at or about that time to institute strike action. Had you in fact in or about May or April of 1962 suggested to Mr. Gilbert as president, the need for or your desire to institute strike action? A. Mr. Zorn, that had been in our hands since the strike day was taken in June, 1960. There was two or three or four hundred letters exchanged possibly about other things during which something might have been mentioned along those lines.

Q. I do not happen to be interested in several hundred letters. I am interested in this letter dated May 22, 1962, which is sent to you by Mr. Gilbert, in which he refers to a letter from you and is a response to a letter of May 7, 1962, by you and I ask you now whether or not at that time you were suggesting strike action in your correspondence to Mr. Gilbert in the month of May, 1962? A. May I ask you if this has to do with mediation case involved in the September 7th and September 16, notices, or if it has to do with mediation case E-240?

Q. The letter does not say. A. I could not answer your question.

Q. All right, then, let me come back to the paragraph: Whether it refers to case E-240 or whether it refers to the

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section 6 notices, do you draw any distinction between the two, Mr. McCullum, now that you have raised the question? A. At what time.

Q. May of 1962. May 22, 1962? A. Yes, sir, there is quite a distinction.

Q. What distinction do you draw? A. We had not completed our handling in this September 7 and September 16 notices.

Q. You had not? A. And with this mediation board at that time still with jurisdiction of E-240.

Q. In other words, the mediation board at this time had jurisdiction of both disputes, the E-240 dispute and the Section 6 dispute, is that correct? A. No, sir.

Q. In the month of May, 1962? A. That is incorrect.

Q. Didn't you testify just a few moments ago that the mediation board did not relinquish jurisdiction of case No. E-240 until sometime in June of 1962? A. That is correct.

Q. And are you drawing a distinction now between your right to strike prior to actual mediation on a section 6 notice, or your right to strike after mediation, is that

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what you are getting at? A. Mr. Zorn, in your previous question you asked me if the mediation board still had jurisdiction of both of these disputes in May, 1962, and I said they did not, and they did not.

Q. In other words, the board did not assume jurisdiction of the section 6 disputes until August of 1962, is that correct? A. We had our first meeting August 21.

Q. All right. Now, let us get back to this paragraph then I will ask you some questions about the other matter.

At this point in May of 1962, first, the mediation board had not terminated its services in case E-240, which was the dispute, this section IV, Diesel Dispute and other

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matters that you referred to, violations of contract that you had claimed, is that right? A. In May they had not.

Q. And at that time in May of 1962 the Section 6 notice that you had served on September 7, 1960 and the Section 6 notice that Southern had served on September 16, 1960, had not yet progressed to the point where the mediation board had taken jurisdiction, is that correct? A. It had not progressed to the point to where they had a right to take jurisdiction and they had not taken jurisdiction.

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Q. They had not taken jurisdiction? A. That is correct.

Q. Since you had submitted your Section 6 notice of September 1960 and the carrier had submitted its notice on September 16, what did you do as an organization to progress your section 6 notice against Southern—your section 6 notice September 7, and their section 6 notice of September 16, did you do anything to move that along to get that dispute resolved in anyway? A. You are speaking now of the September 6.

Q. The two section 6 notices, correct. A. At the time we recessed our conference in October, 1960, the carrier indicated that we would let this stay in abeyance until the thing was settled on a national basis. On that basis I had not asked them to resume conferences.

Q. Mr. McCullum, you know as a fact that in October of 1960, Southern withdrew from the national handling and withdraw from the November, 1959 notice which had been served nationally. You knew that, did you not? A. Yes, I knew that.

Q. You knew that? A. Yes.

Q. So that so far as Southern was concerned, you had

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a somewhat different situation with Southern, where their

Ralph Lindsay McCullum—for Plaintiff—Cross

proposal dealt with attrition, whereas the national proposal did not, is that correct? A. Yes.

Q. This was an important dispute. You had had at least since 1959 and from the documents since 1958, when you were in a real struggle, were you not, with Southern Railway with respect to your claim of violation on the question of hiring new employees as firemen?

My question to you, Mr. McCullum, is why did you not, your organization, proceed to try to get the dispute resolved completely by moving along with respect to the Section 6 notices which you could have done? A. As far as the section 6 notice is concerned, the Railway Labor Act provides that existing agreements will remain in effect until it is changed as provided therein. All during this time we still had our agreement that was in effect before the notice was served.

Q. Yes, but you knew, you had your agreement, you had your version of the agreement but Southern was not agreeing with you. They were just not hiring any new firemen ever since at least 1959, is that correct? A. Sometime in 1959. July or somewhere along in there.

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Q. And you knew at that time— A. Are you suggesting that we strike in 1959?

Q. I have not asked that question. I will come to that in a few—in due course. I am asking you quite a different question. A. Mr. Zorn—

Q. I am asking you, now— A. We made every effort to reasonable people can make, and that takes time.

Q. I have not asked you that question. Well, No. 1, you have never made an attempt to submit the section IV dispute to the National Railroad Adjustment Board at any time since the beginning of this controversy, is that the

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fact? A. We do not have any section IV dispute that I know about.

Q. I am asking you whether you have ever submitted to the Mediation Board any claim with respect to section IV of the diesel agreement? That is my only question. A. Submit it to who?

Q. To the National Railroad Adjustment Board at any time, up to the present time? A. You said the mediation board.

Q. I meant the adjustment board. A. No, I have not made any submission to the adjustment board.

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Q. That answers my question.

Nor have you nor your organization, Mr. McCullum, made any effort to expedite the National Mediation Board's handling of the dispute which involves the Section 6 notices of September 7, 1960 and September 16, 1960, have you? A. The carrier made none either from October 10—

Q. That was not my question. My question was whether you made any effort to do it. A. I had not requested a conference date from October 10 until the carrier made the move.

Q. Nor did you or anybody in your organization, Mr. McCullum, take any action with the mediation board, to your knowledge, to get the mediation board to move along and progress the section 6 disputes. A. The mediation board did not have anything to do with it.

Q. Now, just a minute. These cases were pending and were docketed before the mediation board. That is clear, is it not? A. No, sir, that is not. That did not go to the Mediation Board until August of 1962.

Q. That is what I am talking about. A. The time you

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were talking about I did not take any effort with the Board was from—

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Q. I am asking you two things, Mr. McCullum. A. Would you ask them one at a time?

Q. I am asking you first, these notices were exchanged in September of 1960. You had a conference on October 10, 1962, is that right—no, I withdraw that.

You had a conference on October 10, 1960, is that right? A. Yes.

Q. That you have testified to? A. Yes.

Q. Then you did absolutely nothing on your side—let's not worry about what Southern did, let us worry only about you—you did nothing to seek conferences on the property or to expedite the conclusion of the handling on the property, after you had conceled out on the meeting that was arranged for August 14—strike that out. I have my dates wrong.

Q. Now, we will start again. There was only one meeting October 10, 1960 on the Section 6 notices, right? A. That is correct.

Q. Now, between that time and August of 1962, did you or your organization make any effort whatsoever to proceed to negotiate or to conduct conferences or to ask the mediation board to get into the picture from October 10,

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1960 until August of 1962? A. I previously explained to you, Mr. Zorn, that at our conference October 10, 1960, it was more or less agreed that the thing would stay in abeyance until the National movement was settled or which—when there is a presidential committee appointed.

Q. You had a lot of special conversation and such with Southern you say you did not have with other railroads?

A. Not involved in the section 6.

Q. But you were having quite a scrap all through this?

A. Not with the section 6 notice.

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Q. If you had prevailed on your Section 6 notice or had that resolved you would have gotten rid of this dispute entirely? A. No, sir.

Q. If you had entered into a new agreement? A. If the Southern would not comply with the one they have got, they would not comply with a new one.

Q. In other words, you think then, is it your answer that regardless of what happens, through the efforts of the National Mediation Board in connection with the Section 6 dispute, or whatever else may happen under the procedures of the Railway Labor Act, you are totally
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disinterested in any new agreement of any kind and you are prepared to withdraw now your proposal of September 7, 1960? A. No, sir.

Q. Now, let us get back to one final subject, and that is the question of strike.

The Court: We are going into a new subject. We will take a few minutes at this time.

(Short recess.)

(Bench Conference.)

The Court: The Court had understood Mr. McCullum to say just a few moments ago that Oct. 10, 1960, at the meetings, it was agreed that they would abide by—

Mr. Kramer: They would await the outcome of—

The Court: And would they abide by it?

Mr. Kramer: I doubt if they agreed to that. That I do not know.

The Court: That would be the explanation, then. I think we have to get more information on it.

Mr. Zorn: All right.

Mr. Kramer: I understood him to say it was

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informally agreed they would await the outcome of the national movement.

The Court: Of the national movement.

Mr. Kramer: Yes. I did not understand him to say they would abide by it.

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The Court: No, but they must have related it in some way.

Mr. Kramer: Let us wait and see what happens to the National movement—I understood him to say that.

The Court: What did happen then?

The Kramer: It is still going on.

The Court: Then wouldn't it still be binding, sir?

Mr. Kramer: It was not a binding agreement. Then they invoked mediation.

The Court: This is the first time I have heard any reason given, of why they met Oct. 10, 1960.

Mr. Kramer: They did nothing for 22 months, well, a little less than that. Was it May you sent the telegram?

Mr. Zorn: August.

Mr. Kramer: Was it August? The telegram that you sent to the Board.

Mr. Zorn: We invoked the services of the mediation board in May, you are quite right.

Mr. Kramer: May of 1962.

Mr. Zorn: Yes.

The Court: The only thing is, if it had gone until August of 1962 by some implied understanding or agreement, why could not it keep on going?

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Mr. Kramer: It could but they invoked mediation.

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Mr. Day: May I say a word? In your mind you are not confusing this conference and its subject matter which was the proposal to change the diesel agreement, eliminate it. You are not confusing that with the dispute over the enforcement and living up to it.

The Court: No.

Mr. Day: They are different entirely.

The Court: Oh, yes.

How much longer will you take?

Mr. Zorn: I should not take more than about—I think it is sometimes difficult with this witness. I should be through in fifteen or twenty minutes, I think, but you can appreciate my difficulties.

(A brief recess was taken.)

Deputy Clerk: For the purpose of keeping the record straight, defendants' exhibits through 61, 47 through 61 and 63 through 66 and counsel will now identify them—they are marked—they will identify them on the record.

The Court: All right.

Deputy Clerk: That is for identification.

(Defendants exhibits 47 through 61, 62 through 66 marked for identification.)

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Mr. Sol Kramer: The first number is 47, that is submission to National Railroad Adjustment Board dated on the back page, Jan. 15, 1963, the claim being presented that under their agreements with their firemen three (being the carrier) have not any contractual obligation to hire firemen.

Ralph Lindsay McCullum—for Plaintiff—Cross

No. 48 is a letter to R. L. McCullum from L. G. Tolleson, dated December 4, 1959.

Defendants No. 49 is a letter from R. L. McCullum to L. G. Tolleson, under date of April 18, 1961.

No. 50 is a letter from R. L. McCullum to L. G. Tolleson under date of September 21, 1961.

No. 51 is a letter under signature of R. L. McCullum to L. G. Tolleson dated February 18, 1962.

Defendant No. 52, letter from R. L. McCullum to L. G. Tolleson dated May 15, 1962.

No. 53, letter from R. L. McCullum to L. G. Tolleson dated May 24, 1962.

No. 54—Letter from S. J. Morton, Acting General Chairman of the Plaintiff, on Defendants' lines, to Mr. L. G. Tolleson dated June 8, 1962.

Defendants 55 is a letter dated July 19, 1962 from R. L. McCullum to L. G. Tolleson.

No. 56 is a letter from R. L. McCullum to L. G. Tolleson dated September 4, 1962.

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No. 57 is a letter from R. L. McCullum to L. G. Tolleson dated September 24, 1962.

No. 58 is a letter from R. L. McCullum to L. G. Tolleson dated Oct. 6, 1962.

No. 59 is a letter from R. L. McCullum to L. G. Tolleson, dated Nov. 9, 1962.

No. 60 is a letter dated Nov. 23, 1962 from R. L. McCullum to L. G. Tolleson.

Defendants' No. 61 is a letter from L. G. Tolleson to R. L. McCullum, dated Dec. 10, 1962.

I might note that letter No. 60, and letter 61 is the reply to letter No. 60.

No. 63 is a letter—

Deputy Clerk: 62 is in evidence.

Ralph Lindsay McCullum—for Plaintiff—Cross

Mr. Sol Kramer: Defendants 63 is a letter from McCullum to L. G. Tolleson dated December 3, 1962.

No. 64 which is a reply to exhibit 63, dated December 10, 1962, is a letter from L. G. Tolleson to R. L. McCullum.

Defendants exhibit 65 is a letter from R. L. McCullum to L. G. Tolleson dated January 7, 1963.

No. 66 is a letter from L. G. Tolleson to Mr. W. E. Mitchell, vice president, Brotherhood of Locomotive Firemen and Enginemen, with copies to Mr. McCullum and Mr. Gilbert, under date of July 13, 1960.

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Mr. Kramer: The same as this? That is 66?

Mr. Sol Kramer: I offer exhibits 47 through 61 and 63 through 66 into evidence.

Mr. Kramer: No objection.

The Court: They will be received without objection, also. The Court forgot to mention that I have been advised, I had not noticed that counsel are not using copies of the exhibits. In other words, they are using their file copies. The Court would suggest that as a matter of procedure, when you want an exhibit, you can ask the clerk and she will give you the exhibit.

Mr. Zorn: I am sorry. I will do that, of course.

The Court: So that there cannot be any misunderstanding then.

(Defendants exhibits 47 to 61, and 63 to 66 inclusive received in evidence.)

Mr. Sol Kramer: A telegram dated June 4, from E. C. Thompson, executive secretary of the National

Ralph Lindsay McCullum—for Plaintiff—Cross

Mediation Board, to L. G. Tolleson, has been marked for identification as exhibit 67. I offer that in evidence.

Mr. Milton Kramer: No objection.

Deputy Clerk: Defendants exhibit 67 received in evidence.

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(Defendants exhibit 67 received in evidence.)

The Court: Wait just a moment. The last exhibit, isn't that the one you objected to?

Mr. Kramer: No, sir.

Deputy Clerk: The last one he objected to—

Mr. Kramer: This is a telegram from the mediation board advising the parties it has closed its file on the old case.

The Court: All right.

Mr. Zorn: Could I have this marked for identification, please?

Deputy Clerk: Defendants exhibit 69 for identification, a letter of July 19, 1962 from—on Brotherhood stationery to Mr. Tolleson, from Mr. McCullum.

(Defendants exhibit 69 marked for identification.)

Mr. Zorn: Mark this Plaintiffs exhibit 70—defendants 70.

(Defendants exhibit 70 is marked for identification.)

Ralph Lindsay McCullum—for Plaintiff—Cross

By Mr. Zorn:

Q. In view of your statements just prior to the recess,
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Mr. McCullum, I would like to show you a letter dated July 19, 1962, from you to Mr. Tolleson, identified here as defendants exhibit 69 for identification and ask you whether you sent that letter to Mr. Tolleson. A. I did.

Q. I show you a document identified defendant exhibit 70 for identification and ask you whether this was the letter which you received from Mr. Tolleson in response to your letter of July 19? A. Yes, I received it.

Q. Without reading the entire letter in the record, but I think to clarify some questions that Judge Walsh may have —Defendants exhibit—

Mr. Zorn: Let me offer them in evidence first.

Mr. Milton Kramer: May I see them?

Mr. Zorn: Surely.

I would like to offer in evidence the two documents just identified by the witness, defendants 69 for identification and 70.

Mr. Kramer: No objection.

The Court: Received.

(Defendants exhibits 69 and 70 are received into evidence.)

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By Mr. Zorn:

Q. On July 19, 1962, Mr. Tolleson wired you proposing conference to be resumed on Tuesday, July 24 and asked that you please advise, is that correct? A. Yes.

Q. In view of what you said a little earlier, in your letter replying to that, you say to Mr. Tolleson in your letter of July 19—and I quote:

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"Our original conference was held in your office Oct. 10, 1960. This conference was adjourned October 10 with the understanding that our conference was not concluded and we would resume discussion on a mutually convenient date. In view of the understanding and the suggestion made in your telegram July 19, I suggest conference will be resumed August 14, 1962."

That is what you told Mr. Tolleson, right? A. Yes.

Q. In his reply to you, Defendant exhibit 70, he says, he having proposed an earlier date of July 24 for the conference, he says in the concluding paragraph, and I quote:

"Do you suggest that we commence conference August 14 instead of July 24? If you cannot make it

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earlier, I am agreeable to that date. Please understand that we do not want this matter dragged out, and that it is our intention and we hope yours, to bargain in good faith."

That is what he said to you, right? A. Yes.

Q. So on the basis of the letters I have just shown you, Mr. McCullum, there was never any agreement, was there, when you concluded your first conference in October of 1960, that this matter would be held in abeyance awaiting the disposition of the national situation? A. I do not know how you are using the word "agreement." I do not believe I said there was any agreement. I said that was discussed. It is evident that the carrier was not in a hurry because we completed conferences on several railroads here. I think we got out of his office before 12 o'clock and we did not go in until ten. So you know there was no urgency

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on the part of the carrier at that time. There was no effort made to dispose of it.

Q. Equally, I think, there was no urgency on your part, because it was the carrier who, after the first conference, took the initiative, did he not, in trying to set the second conference, is not that true? A. Yes, that is right.

Q. So far as your organization was concerned, your organization took no initiative at any time, in processing

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the Section 6 notice controversy, either through conferences on the property or through the National Mediation Board?

A. Mr. Zorn, we had an agreement providing for firemen on all locomotives, and we would not be in any hurry to—

Mr. Zorn: Move to strike that as not responsive. I asked him a very simple question.

The Court: It will be stricken.

The Witness: Repeat your question.

Mr. Zorn: Would you read it?

(The reporter read the question.)

The Witness: That is correct, Mr. Zorn. I understood from the conversation during the conference that we would resume negotiations after the thing was settled on a national basis.

By Mr. Zorn:

Q. That was your understanding, but there was no agreement on that. A. I did not say there was an agreement.

Q. The fact is that Mr. Tolleson initiated the efforts to resume conferences. A. That is correct.

Q. And it was Mr. Tolleson who subsequently invoked the services of the Mediation Board, is that correct, or

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requested the mediation board to docket the case. A. I

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understand that he did.

Q. Well, now during this period, in or about the middle of the year 1962, I had asked you earlier about certain correspondence between Mr. Mitchell and Mr. Gilbert, president of the organization, dealing with suggestion of a strike against the Southern Railroad. Before we got off on the section 6 angle, I had started to inquire of you—

Mr. Zorn: May I have defendants' exhibit 14.

Deputy Clerk: Yes, sir (handing exhibit to Mr. Zorn).

By Mr. Zorn:

Q. I started to ask you whether or not on May 7, 1962, you had written to Mr. Gilbert suggesting again or requesting his approval, which is necessary for a strike against Southern? A. May I see that?

(Document handed to witness.)

This is a letter from Mr. Gilbert to me.

Q. That is right, and it is in response, is it not—it starts off by saying, "This will acknowledge receipt of your May 7 letter and enclosure. Further in connection with the dispute of the management of Southern Railway involving proper application of the current national vacation agreement May 7, 1950, diesel agreement, and the matter of hiring sufficient firemen (helpers) to adequately man the service."

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Is Mr. Gilbert accurately referring to the contents of your letter to him of May 7 there? A. You are asking a

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little bit extra, Mr. Zorn, to think that I could remember the content of every letter I have written since May, 1960.

Q. To the best of your recollection. A. Well, I am sure that was the subject matter.

Q. All right. He goes on to say to you—I want to ask you next what you had said to him— “It is observed that the situation has improved to some slight extent during the past few months but that there is a shortage of firemen (helpers) on many divisions still remains critical. Noted also are your suggestions for immediate relief for the current mal-practice under the National Vacation Agreement.”

Does that refresh your recollection as to the subject matter of your letter to him? A. There has been lots of letters along that line.

Q. Let me read this next paragraph because you see, I want to be certain as to whether or not you were suggesting strike action at this time. In the next paragraph, and I quote, the third paragraph of the letter.

“While considerable merit may be contained in your proposal to institute strike action, care must be exer-

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cised not to lose sight of the injunctive processes of the courts under the Minor Grievance Doctrine of the United States Supreme Court in the Chicago River and Indiana Railway Case. Since the National Work Rules Dispute is rapidly reaching a climax, the question arises as to the wisdom of seeking a remedy on the Southern Railway through this method at the present time, despite the apparent justification for same. In evaluating the situation from a procedural standpoint, strike action premised on the assumption that the carrier would seek injunctive relief, might possibly provide a solution to the problem.”

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Do you recall receiving that letter and reading it? A. Yes, sir.

Q. Can you tell us what you understood, what you understood Mr. Gilbert to mean when at the end of that paragraph he says, "Strike action premised on the assumption that the carrier would seek injunctive relief might provide a solution to the problem." A. No, I do not know.

Q. You do not even know what he had in mind? A. No.

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Q. But the fact is clear, is it not, that he is referring there in this letter of May 22, defendants' exhibit 14, to your proposal to institute strike action against Southern; that is clear, is it not? A. The proposal had been in, Mr. Zorn, since July of 1960.

Q. Since July of 1960. A. The strike vote was taken in June of 1960.

Q. Well, now, what were the issues which were presented to your general grievance committee and your local in July, 1960, or June, rather, 1960, when your strike ballot was distributed, as to what it was that you were asking the men to vote strike on? A. The carriers' failure to comply with current collective bargaining agreement between the Brotherhood of Locomotive Firemen and Enginemen and the Southern Railway System.

Q. Now, in the information which you conveyed to the local chairman, as the background for their strike ballot, did you refer to violations of section 4 of the diesel agreement? A. We referred to the carriers' operation of trains without a fireman taken from the seniority ranks of firemen, yes.

Q. You did. Did you also in bringing this—bringing this

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strike to a head-in also bring to your people's attention

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your claim that the carrier was likewise violating the mileage limitation and the vacation rules of the agreement? A. All of these three items have been handled along with the carrier during this time.

Q. That was not my question. A. All right. It was mentioned to them.

Q. It was? A. Yes.

Q. So that in the information you conveyed to the local, rather, to the local chairman on which they voted to strike Southern, you pointed out violations or claimed violations on your part of the diesel agreement, of the vacation, and of the mileage provisions, is that right? A. They were all mentioned.

Q. And that was in fact the situation at that time, you were and you had been claiming prior to June of 1960 not merely violation of section IV of the Diesel Agreement, but also violation of vacation provisions and violation of mileage limitations by reason of your claim that they had improperly canceled vacations and had exceeded mileage. Those were all in the picture, were they not, before the strike ballot was taken? A. Yes, sir, that is a

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matter of record.

Q. Now, that strike which had been set for July 26, 1960, never took place, is that correct, that particular strike? You did not go out on July 26, 1960. A. No, the mediation board proffered its services and its strike was postponed.

Q. Now, in May and probably earlier than May of 1962, you were corresponding with Mr. Gilbert with respect to calling a strike in 1962, is that correct? A. There was some correspondence about it, yes, sir.

Q. I take it from the correspondence I have just read that you were urging Mr. Gilbert's approval to a strike

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in the month of May or sometime later in 1962, is not that correct? A. Well, the strike date could not be set, Mr. Zorn, until, I guess that may be a legal question, too, until the mediation board had released jurisdiction.

Q. And the mediation board actually terminated its services or released jurisdiction early in June of 1962, right?

A. That is right.

Q. Of this particular dispute case E-240? A. June 4, I believe.

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Q. June 4, that is correct.

So at least in your mind you were contemplating a strike against Southern just as soon as the mediation board relinquished this jurisdiction—relinquished its jurisdiction, right? A. We took a strike vote in 1960, Mr. Zorn.

Q. That is what I would like to ask you about. You took a strike vote in June of 1960, and now we are in May and possibly June of 1962, and as a matter of fact, your organization, as you know, set up January 13, 1963, 6:30 a.m., as the date on which to strike Southern, is not that right? A. Yes.

Q. I would like to ask you, Mr. McCullum, whether or not you ever discussed with Mr. Jennings the problem of the basis on which you would call this strike of January 3, 1963. A. Yes, we discussed it.

Q. I will read you from a memorandum dated November 15, 1962, which is in evidence here, as defendants' exhibit 19 and it is a memorandum from Mr. Jennings to Mr. Gilbert taken from the files of the organization, and it is headed "Subject, Proposed Strike Action, Southern Railways."

I read the first paragraph to you.

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"In dealing with this situation and keeping in mind the necessity of proceeding in this action without becoming involved with the present litigation involving Section IV of the Diesel Agreement, it would appear necessary that we predicate all of our actions on violations of other agreements in effect on the Southern System."

Does this refresh your recollection of any such discussions you had with Mr. Jennings? A. We probably discussed that, yes.

Q. And, in fact, Mr. McCullum, is it not true that when, on November 27, 1962, you sent a letter which is in evidence here as Defendants' exhibit 20, to all local chairmen, with respect to the strike, which letter indicates that it was approved by Mr. Jennings—and this is in evidence—you advised the local chairmen that the strike vote in June 27, 1960 was over or in connection with the failure of the carrier to comply with the provisions of article 25, mileage limitation and the vacation agreements, and you said, "The vote of the General Grievance Committee was unanimous for withdrawal from service and a strike was authorized to begin on July 26, 1960 and was postponed at the request of the National Mediation Board."

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That is what you said in that letter, is it not? A. Yes, sir.

Q. Now, the previous correspondence I showed you, Mr. McCullum, dealing with the strike or the threatened strike of July 26, 1960, Mr. Gilbert's telegram to the National Mediation Board, your telegram to the carrier, dealt with—and your organization's position was—that the strike

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was because of a violation of the diesel agreement; is not that correct? A. Mileage and vacation included.

Q. Vacation included?

Well, have you not said in correspondence and otherwise, and in statements you have made, that the strike called for July 26, 1960, was a strike in protest against the violation of our diesel agreement, whereas the strike that was called for January 13, 1963 was a strike that dealt only with claimed violations of mileage and vacations, is not that what you have been saying? A. No, sir, it is not. If you would ask those questions one at a time, I would answer them.

Q. Mr. McCullum, is there a single word in your explanation to your local chairman in your letter of November 27, 1962, which preceded the strike call of January 13, 1963, is there a single word of explanation there which refers in any way whatsoever to a claimed violation of section 4 of

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the diesel agreement, or refusal to hire new firemen.

Mr. Kramer: Your Honor, I object. When this line of testimony started, I did not care. It was taking a long time. It seems completely irrelevant to this case. It seems to be directed to the question as to whether the strike involved in the other case was properly called, and that has nothing to do with this case. We are letting a document in which is perpetuating an irrelevancy.

Mr. Zorn: If your Honor recalls, when we appeared before you just prior to January 13, to argue on our application for restraining order, one of the points we made to you very clearly was that, among other things, such a strike was in derogation of the

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jurisdiction of this court, and repeatedly the position has been taken that the July 26, 1960 threatened strike, was over diesel violations. But that this new threatened strike had nothing to do with diesel but only had to do with vacation and mileage.

I would simply like the record to show that because I think it goes to the heart of the question of clean hands of the plaintiff in this proceeding.

Mr. Kramer: It is totally irrelevant and Mr. Zorn is mistaken in part. I do not think the first strike was called only over violation of diesel. The lawsuit was caused because of violation of the diesel agreement, and that the 1963 was over mileage and vacation.

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All of that has nothing to do with this case.

Mr. Zorn: Your Honor, I would ask you to look at this memorandum, defendants' exhibit 9, and I think it will be clear on the face of it what has been done here.

The Court: I wonder if you gentlemen would come up here.

(At the Bench.)

The Court: Mr. Kramer, the Court understands from the testimony of the witness that there was discussion with Mr. Gilbert, with the other executive officers, in 1960, pertaining to a strike notice and that subsequent to that the proper procedure was followed. Now, that correspondence has been introduced into evidence, telegrams and such.

Mr. Kramer: Yes.

The Court: We have heard from Mr. Gilbert.

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Mr. Kramer: That is right.

The Court: Now, does the witness McCullum say that that strike was predicated on violation of the diesel?

Mr. Kramer: All three. I understood him to say that strike was predicated on all three, diesels, vacations and mileage limitations.

The Court: The notice does not say that.

Mr. Kramer: The strike ballot does.

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The Court: What does the strike ballot say?

Mr. Zorn: The strike ballot is silent.

Mr. Kramer: Well, I mean the accompanying letter said that they have been violating the diesel agreement, the mileage, and the limitation agreement.

The Court: Then there came a time in 1962 when it was decided to go on strike January 13, 1963?

Mr. Kramer: Yes.

The Court: That was predicated on that notice.

Mr. Kramer: It was predicated on that vote, on two of the three issues, and not all three.

The Court: Well, wouldn't it go to the credibility or to the weight that you would give to the matter that is before the Court on the testimony?

Mr. Kramer: I do not see any connection.

The Court: Well, certainly all of the correspondence, all of the telegrams, the vice presidents being assigned, pertain to the diesel.

Mr. Kramer: The 1960 strike that was called pertained to all three.

The Court: I say, but all of the testimony that we have been hearing pertained to the diesel agreement.

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Mr. Kramer: Not all. It pertains to the mileage, vacation and limitation.

The Court: Well, there was reference to it.

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Mr. Kramer: Yes, a lot of these documents referred to all three. We never said the 1960 was over the diesel—

Mr. Zorn: Your Honor, read the first sentence of that report. I think that is self-evident of what has been happening here.

Mr. Kramer: I have seen it too good.

Mr. Zorn: To refresh your recollection, this was Mr. Gilbert who said in 1960 this strike was—what it was about.

The Court: Yes.

Mr. Kramer: That is quite right. This lawsuit involves section 6, section 4 of the diesel agreement. It did not want to call this strike over what was involved in this lawsuit. That is what that first paragraph says.

The Court: It what?

Mr. Kramer: That the dispute over section 4 was involved in this lawsuit. Therefore, in calling a 1963 strike they did not want to call it over the issue that was pending in this court. Therefore, they called it over the vacation and limitation and mileage dispute.

Mr. Zorn: There was no further vote on it. They relied on the same vote more than two years later. They called the men out on strike and told them one of the reasons for the strike called. They are not identical.

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I am not going to press this any further.

The Court: The objection will be overruled. If they are going to go any further now.

Mr. Zorn: I am not going to press it any further.

The Court: All right.

(In open court.)

Mr. Zorn: Mr. McCullum, thank you very much. No further questions.

Redirect Examination by Mr. Kramer:

Q. Mr. McCullum, in your direct testimony, you used the figure 259 with reference to the number of new firemen you thought the Southern had hired. In what period? A. That was from May 17, 1950 to June, 1960.

Q. Did it include anybody hired in May or did it begin June 1? A. Of 1950.

Q. Yes. A. I am not positive. I think it was May or June. We had it on a sheet.

Q. What happened to those sheets? Have you got them?

The Court: They were identified.

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Mr. Zorn: Yes, they were marked for identification. He has them.

The Witness: June, through December, 1950, it started in June.

By Mr. Kramer:

Q. Now, did it include anybody employed after April 1960? A. No. January through April 1960.

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Q. Now, in so far as any evidence may show that someone with a seniority date after April 1960 also had a seniority date on another division before April, 1960, was he included in your figure of 259? A. No.

Q. Would that then exclude people who were transferred or whatever word you want to use, employed in another division after April 1960? A. Yes, that figure did not include those people.

Q. Now, Mr. Zorn examined you to some extent with respect to an affidavit you made last October or November in which it was stated that the Southern had not employed any firemen since about July, 1959. Is that your present understanding? A. Well, in a month or two or three of that, that may not be the positive exact date, but it is close.

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Q. Under your collective bargaining agreements with the Southern, prior to April, 1960, could a fireman retain his seniority on his old district if he worked on a new district and was called back? A. Prior to the agreement of April 22, 1960, this fireman would have had thirty days in which to elect in which district he desired to hold seniority.

Q. If he elected to continue to work, in his new district would he forfeit his seniority in the old district? A. Right. After thirty days.

Q. Would his seniority in his old district be an older authority? A. It would no longer exist, but he would have an older date, of course.

Q. That is what I meant.

You stated, in response to some questions by Mr. Zorn, that a complaint was made about a shortage of firemen, is that right, from time to time, ever since you have been General Chairman; is that not right? A. Yes.

Q. Did you make similar complaints when you were a local chairman? A. Sure.

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Q. What happened when you made such complaints when you were a local chairman? A. Well, the master mechanic and/or the train master, whomever they designated, would employ men to fill the list.

Q. To employ enough men so there would no longer be a shortage. A. That is correct.

Q. Was that the universal practice while you were local chairman. A. Oh, yes.

Q. Was it the practice when you became general chairman? A. Right.

Q. How long did it continue to be the practice after you became general chairman?

Mr. Zorn: Your Honor, you understand that the objections I have made before on this line of practice still stand. The question of practice with respect to any question of construction of the agreement—

Mr. Kramer: I am not talking about practice in general. Practice under the agreement?

Mr. Zorn: Yes, that is a basis of my objection also. I wanted the record to make that clear.

The Court: The objection will be overruled.

By Mr. Kramer:

Q. Did you answer my question about this that it—did

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that continue to become the practice after you were general chairman. A. Yes, that is right.

Q. How long after you became general chairman did it continue to be the practice? A. Up until around July, 1960 was when there was more of a change than there

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had been, because we were pretty definite at that time that they did not intend to follow that practice, or the rule.

Q. Now, Mr. McCullum, when you say you complained about a shortage of firemen back when you were general chairman and when you first became, back when you were local chairman and when you first became general chairman, do you mean that you complained about running against—running trains without firemen, or that there were not enough men on the extra board to fill the expected number of runs in the ensuing month? A. There was not enough men on the board to fill the bill under the mileage agreement. If they filled them, the men would have to exceed the mileage, in other words.

Q. You were not complaining about running alone with a locomotive without firemen at that time? A. They did not run any without firemen.

Q. Just a little point: Are your local chairmen all working firemen? Or are they employees of the brotherhood?
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A. They are working.

Q. Working as firemen? A. Well, in engine service.

Q. Firemen or engineers, right? A. Yes.

Q. All of them. A. Yes, all of them.

Q. I show you a document which is in evidence as defendants exhibit 17, your telegram, from you to Mr. Tolleson. Now, I think it is not clear from the prior testimony just what you meant. Did you mean that you would not meet with Mr. Tolleson any more? A. No.

Q. What did you mean? A. I knew I would have to meet him sometime and we would have to do that to reach an agreement on anything.

I just meant that I could not meet him on the 14th.

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Q. Mr. McCullum, you testified concerning what happened after your conference on October 10, 1960 with respect to your respective section 6 notices, and Mr. Zorn brought out that you did nothing to resume the conferences from then until whatever it was, the next 18 or 20 months.

Why did you not initiate the resumption of conferences?

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A. Well, the carriers' notice was to abrogate an agreement that we had, and there was not any reason to rush into that, on our part.

Mr. Kramer: No further questions.

Mr. Zorn: I have no questions.

The Court: All right.

Mr. McCullum, taking a practical example for instance, you say that the employee is a fireman and he is hired in 1945. Let us say, and let us say for instance, that he works in one division, then he is transferred to the Washington Division. Now what place would he have on the roll as of say, 1963?

Would he have the date that he was originally employed in Memphis, or would he have the date that he was employed in Washington?

The Witness: When you said "employed," and the other time you said "transferred." I am answering the question on the basis that he is employed on the Washington division. His seniority date on the Washington division would start the first day he made his first pay trip after being assigned to the Washington division extra list.

The Court: Now, suppose that he was transferred from Memphis to Washington; what would be his listing?

Ralph Lindsay McCullum—for Plaintiff—Redirect

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A. If we are speaking of that, your Honor, in the vein of just going over there to help out because of an unusual amount of business, that might be caused by floods or something, he would not establish any seniority at all, just working under those conditions. He would go back to the Memphis division when that was over.

But if he was employed, he would establish a day.

The Court: What would that date be?

The Witness: It would be the date he made his first trip after being assigned to the Washington division Fireman's extra list.

The Court: Then of the 259 employees that you say were new employees from May 17, 1950, up to approximately 1960, the Court understood you to say that there might be a dozen that may have worked for the Southern in other division.

A. Yes, I said that.

The Court: Now, the rest would be new men, new employees that had never worked for the railroad as firemen, that is for the Southern Railway system.

The Witness: Yes.

The Court: Now, how do you determine that?

The Witness: That on my part was more or less

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of an estimate. I would have to take these lists and check every one of them to see if he had ever been on another list prior to 1950. I knew in my own mind that there was very few that did move from one division to another prior to 1950. We did not

Ralph Lindsay McCullum—for Plaintiff—Redirect

have this problem of this long cut-off list prior to that time much because the diesel engine and the automation had not hit us so hard. When this was started and Mr. Tolleson made his pitch about the consolidating of the lists at that time I think Danville Division alone, which is 154 miles, had 88 or 89 or 90 men furloughed, and that is unusual.

The Court: During the time that you were in the position which you now hold, that is, from 195 up until the present time, as general chairman, as against your local chairman when you were connected with the road, did you ever receive any complaints from your fellow workers on mileage and on vacations?

The Witness: There has been complaints made about men being required to exceed the mileage.

The Court: In the letters you sent to the International, to Mr. Gilbert, your letters to him, did you through your representative capacity indicate to him the complaints that you were receiving on the vacation and on the mileage?

A. Yes, we gave him in many instances the names of the

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the enginemen and the amount of mileage they made above the maximum provided in Article 25-E.

The Court: Then, Mr. McCullum, the court understands from your testimony that the matter was submitted to what, the Grievance Committee, in 1960?

The Witness: Yes.

The Court: And they had before, that is, the grievance committee, had before them the alleged

Ralph Lindsay McCullum—for Plaintiff—Redirect

violation of the vacation, mileage, and diesel agreement?

The Witness: Yes.

The Court: Now, then in 1962, late in 1962 or the beginning of 1963, the matter was not resubmitted to the grievance committee, only on mileage and vacation?

The Witness: It was not actually resubmitted in the form of a strike ballot, if that is what you mean.

The Court: In other words, that strike was predicated on the vote in 1960?

The Witness: Yes.

The Court: You may step down.

The Witness: Could I ask a question? I thought he was returning this to me. Is this the Court's property? I had it in my pocket.

The Court: No, it is your own. The point is,
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Mr. McCullough, when you use a memorandum to refresh your own recollection, the opposing counsel has the right to see the memorandum. Now, counsel has already seen it and that is the end of it.

The Witness: The reason I asked, he said it had a number and I thought I was taking court property and I did not want to do that.

(Witness excused.)

The Court: All right, ten o'clock tomorrow morning.

(At 4:25 p.m. the trial was adjourned until 10 a.m., Thursday, February 21, 1963.)

Proceedings

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil No. 2881-62

[SAME TITLE]

Washington, D. C.

Thursday, February 21, 1963

The above-entitled cause was resumed for hearing before
HON. LEONARD P. WALSH, Judge, (Civil non-jury), at 10
o'clock a.m., Thursday, February 21, 1963.

APPEARANCES:*For the Plaintiff:*

Mr. Milton Kramer, Esq.

and

Mr. Russell B. Day, Esq.

For the Defendants:

Mr. Burton A. Zorn, Esq.

Mr. Thomas A. Flannery, Esq.

Mr. Larry M. Lavinsky, Esq.

Mr. Sol G. Kramer, Esq.

PROCEEDINGS

The Court: All right, gentlemen.

Mr. Milton Kramer: Your Honor, yesterday in cross examining Mr. McCullum, the subject was developed, and that was not dealt with on direct examination, which we thought irrelevant to this case. But in view of the fact that part of the story is in,

Henry E. Gilbert—for Plaintiff—Recalled—Direct

I think the Court should have the full story with respect to the circumstances under which the 1963 strike was called.

For that purpose I would like permission to recall Mr. Gilbert for further direct examination.

The Court: All right.

Thereupon HENRY E. GILBERT a witness having been duly sworn, was recalled and testified further as follows:

The Court: You have been sworn and you know your oath carries over to the testimony now.

The Witness: Yes, sir.

Direct Examination by Mr. Kramer:

Q. Mr. Gilbert, will you explain to the court what the mechanics are by which a strike is called by your organization? A. Well, under the laws of the Brotherhood of Locomotive Firemen and Enginemen, any dispute arising

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on our property our general grievance committee has authority to spread a strike both among the chairmen on the property, without any approval from the International President, but they do have an obligation to request assistance when it comes to tabulating the ballots and when that is done, we assign a vice president to supervise the tabulation of the ballots. Until that takes place, we do not have to know, of necessity, what has been included in the strike ballot.

Then, after we assign an officer to supervise it, from then on we have knowledge and no strike can become legal in so far as our organization is concerned unless it is approved by the International President.

Q. Now, with respect to this case, for example, or with respect to the strike of 1963, what events occurred leading

Henry E. Gilbert—for Plaintiff—Recalled—Direct

up to your authorization? A. Well, in the 1960 strike authorization—and I might state for the purposes of the Court that we have an understanding with the National Mediation Board that we will give them at least 72 hours' notice of any strike that we expect to inaugurate, in order that they may have an opportunity to proffer their services, and through the years they have been productive of avoiding the ultimate strike and we have been able to work out an agreement on the disputes. Well, that did not happen in the 1960 situation, but we have also observed the status quo that they ask both parties to observe in the process

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of their mediatory efforts. In the interim between the strike authorized in 1960 and the one authorized in 1963, we, upon advice of counsel, removed one of the items, the one involving the violation of the law on the part of the Southern Railroad, violation of Section two, Seventh of the Railway Labor Act, and eliminated an agreement we had with them on the basis that that was a matter that should be dealt with in court, and it was on that premise that the part about the section four was removed from the strike authority, and only the matters involving the application of the mileage rule and the vacation agreement was left in the strike that was authorized for January, 1963.

Q. Did you receive a request for authorization of the 1963 strike? A. I did.

Q. From whom? A. From our vice president.

Q. And what did you then do? A. I authorized a strike as he requested.

Q. Well, prior to authorizing the strike, did you seek advice, or consultation? A. Well, yes, we had consultations in connection with it; yes, sir.

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Q. With whom? A. With our attorney.

Henry E. Gilbert—for Plaintiff—Recalled—Direct

Q. What did he tell you? A. Well, he said that the situation was that we would be able to strike only on the mileage and the vacation dispute because the other was before the Court and we had understood that from previous conversations.

Q. Who was the attorney you consulted? A. Mr. Heiss. He is our general counsel.

Q. Mr. Gilbert, when you testified the other day, you identified a letter dated December 12, 1962 that you received from Mr. Brosnan. I show you Plaintiff's exhibit No. 9 and ask you whether that is a copy of the letter you received from Mr. Brosnan? A. It is.

Q. Did you respond to that letter? A. I did.

Q. I show you the carbon copy of the letter with your original signature, January 8, 1963, from you to Mr. Brosnan, and ask you if that is a copy of your reply to Mr. Brosnan. A. It is.

Q. I should have had it marked for identification.

Mr. Kramer: I am sorry—may this be marked for identification?

Deputy Clerk: Plaintiff's Exhibit No. 13 for identification.

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(Plaintiff's Exhibit No. 13 was marked for identification.)

Mr. Zorn: No objection.

Mr. Kramer: I offer it in evidence.

Deputy Clerk: Plaintiff's 13 is received in evidence.

(Plaintiff's Exhibit No. 13 is received in evidence.)

Henry E. Gilbert—for Plaintiff—Recalled—Direct

By Mr. Kramer:

Q. Mr. Gilbert, between the December 12, 1962 letter from Mr. Brosnan to you and your reply of January 8, 1963 to him, did you have a further conversation with Mr. Brosnan? A. No, I did not.

Deputy Clerk: Plaintiff's Exhibit 14 for identification.

(Plaintiff's Exhibit 14 marked for identification.)

Deputy Clerk: It is a copy of a Western Union Telegram dated January 9, 1963 marked for identification.

Plaintiff's Exhibit 15 for identification is a Western Union telegram to R. L. McCullum from H. E. Gilbert.

(Plaintiff's Exhibit 15 marked for identification.)

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By Mr. Kramer:

Q. After you received the request from Mr. Jennings to authorize a strike in 1963, what did you do? A. I also wired our general chairman, as is our custom, to advise him with respect to the strike.

Q. When you say you also advised your general chairman, in addition to whom? A. To our vice president.

Q. I show you a document marked Plaintiff exhibit 14 for identification and ask you if that is a copy of your telegram—of your advice to Mr. Jennings? A. Yes, sir.

Q. I ask you if there is a typographical error in the copy that you have? A. There is.

Henry E. Gilbert—for Plaintiff—Recalled—Direct

Q. What is it? A. The telegram has an "OSR," ahead of the words, "General Chairman" in the fourth line, and it should be "our"—"Our General Chairman."

Q. Does that appear in the original or just on here? A. It is in the original.

Q. I show you a document marked Plaintiff's exhibit 15 for identification which appears to be a telegram, from you

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to Mr. McCullum, is that a copy of the telegram you sent to Mr. McCullum at that time? A. That is correct.

Q. When were these two telegrams sent? A. January 9.

Q. Both on the same day? A. Yes.

Mr. Zorn: May I see that second one?

(Document handed to counsel.)

Mr. Kramer: I offer Plaintiff's exhibits 14 and 15 for identification in evidence.

Mr. Zorn: No objection.

The Court: They will be received without objection.

Deputy Clerk: Plaintiff's exhibits 14 and 15 received in evidence.

(Plaintiff's exhibits 14 and 15 are received in evidence.)

By Mr. Kramer:

Q. Now, Mr. Gilbert, you testified that you authorized a strike over two of the issues. Have you on previous occasions authorized a strike on fewer issues than the issues on which the strike vote was taken? A. Yes.

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Mr. Zorn: That is objected to. It is completely irrelevant.

Henry E. Gilbert—for Plaintiff—Recalled—Direct

The Court: The objection will be overruled. The witness may answer.

The Witness: Yes, that is not an unusual circumstance, because we are entitled to have more experience about those matters over which a strike can be authorized without being declared illegal or on which we can be enjoined and make it stick. It becomes necessary for us to, under the circumstances I cited, to eliminate some of those items that we feel that we cannot justify under the circumstances of authorizing a strike with those included.

Q. Would you give some instances of the kind of issues you might delete from the strike which were included in the strike vote? A. Well, there are times that there are claims involved which may include an organizational dispute on which no determination has been made as to the ownership of the work, and a committee might want a strike or care to enforce their demands for the work or complain because they do not get it.

We would remove that from a strike ballot because we have an obligation to adjudicate the dispute within the organization, and then process whatever might be needed

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to get the work to the right people.

Q. Now, Mr. Gilbert, to your personal knowledge, for how long a period of time have presidents of the Brotherhood of Locomotive Firemen and Enginemen authorized strikes over less than all the issues that were included in the strike vote?

Mr. Zorn: Same objection, your Honor.

The Court: The Court will overrule the objection.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

The Witness: Well, I think my first experience in the strike was some thirty years ago and that has been the vogue in the organization because of the responsibility that rests on the chief executive of the organization. Once a strike is authorized, it is his responsibility that it is appropriate and legal because, if it is not, then the organization as such might be subjected to some pretty heavy penalties.

Mr. Kramer: No further questions.

Cross Examination by Mr. Zorn:

Q. Mr. Gilbert, as you know the facts, when the strike ballot was taken by the general grievance committee, some time in or about June of 1960, is it not the fact that three issues were presented as information to the general grievance committee with respect to their vote on the strike,

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namely, the violation of section four of the Diesel Agreement, the violation of vacation provisions and the violation of the mileage limitation sections of the agreement? A. Repudiation of the Diesel Agreement, the violation of the mileage agreement, and the violation of the vacation agreement.

Q. And it was on the basis, sir, of that information, was it not, that the general grievance committee voted a strike, the information submitted to them at that time in 1960.

A. That is correct.

Q. Now, I think you have already indicated that thereafter there was no further ballot taken with respect to the strike which was announced for January 13, 1963, that is correct, is it not? A. Yes, sir.

Q. Now, you will recall, will you not, Mr. Gilbert, that defendants exhibit 20 is a letter dated November 27, 1962,

Henry E. Gilbert—for Plaintiff—Recalled—Cross

addressed to all the local chairmen, BLF&E, Southern Railway System, and so forth, signed by Mr. McCullum, approved by Mr. Jennings, your vice president. Do you recall that letter from your file, sir? A. Yes, sir.

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Q. Would you look, sir, at the first paragraph of that letter, defendants exhibit 20, and tell me whether or not there is any reference whatever in this letter which deals with a strike called, to any violation or alleged repudiation of Section IV of the Diesel Agreement? A. No, sir, there is not. You are talking about the first paragraph.

Q. That is right. A. That is correct.

Q. In the entire letter which was an informational letter, was it not? A. It was instructions, Mr. Zorn, as to the conduct of the strike.

Q. Correct. In other words, this letter, without reading it into the record, this letter constituted instructions to all of the members of the general grievance committee of your organization on Southern Railway and contains instructions with respect to a strike to be called, the date of which was not announced in that particular letter, is that right? A. The date had not been determined.

Q. At that time? A. That is correct.

Q. But these are strike instructions to the General Griev-

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ance Committee, is that right, sir? A. Yes, sir. As to how the strike would be conducted. It is.

Q. Now, these local chairmen who constitute the general grievance committee had taken a ballot some time in June of 1960 as to whether or not they desired to strike Southern, and in connection with that ballot, they were advised, were they not, that the strike was being called for violation, or using your own words, if you choose, alleged repudiation or

Henry E. Gilbert—for Plaintiff—Recalled—Cross

repudiation of the diesel agreement, vacation and mileage. That is the advice on which they voted, is that not correct? A. That was the ballot that was submitted to them, Mr. Zorn, by the general chairman.

Q. But without any subsequent vote with respect to the 1962 or early 1963 strike called, the letter of strike instructions makes no reference whatsoever to any alleged violation of section four of the diesel agreement, but refers only to violations of the vacation and the mileage limitation provisions. That is correct? A. Yes, but I might add, Mr. Zorn, the people involved received full information about the reason for the third issue being removed.

Q. Well, I would like you to clarify that for us, if you will, please.

Why was the third issue removed in your formal notices
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with respect to the strike which was finally called for January 3, 1963? A. Because it had been submitted to the Court for adjudication.

Q. But the actual situation, however, with respect to the alleged continuance of violations of section four, had continued. We were still in real controversy on that, were we not? A. They are still continuing.

Q. And still continues. A. Repudiation of the agreement is still in effect.

Q. Now, do you mean—do I understand your testimony to be then, Mr. Gilbert, that you were concerned with certain legal aspects of the situation by reason of the fact that your organization had commenced this present action in this court, and that you were advised by your attorneys that when you called the strike finally for January 9, 1963, it would be legally advisable for you to limit the strike call to only two violations, namely, vacation and mileage, is that correct, sir? A. That determination was made some

Henry E. Gilbert—for Plaintiff—Recalled—Cross

while before that because of experience that we have had in these matters, Mr. Zorn, where we have a matter before a tribunal for adjudication, we have been advised that it is

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not legal to undertake to exercise it in connection with that.

Q. Mr. Gilbert, let me ask you this: Yours is a democratic organization, I take it, as a union? A. For 90 years we have been.

Q. And I think you are quite proud of it. A. Yes, sir.

Q. And in the exercise of the democracy which you have in that organization, you do not, as president, assume the authority by yourself to call a strike, is that correct? A. That is correct. I cannot call a strike of my own volition.

Q. And so, following your usual or general principles of democracy, there was a strike vote taken of all of the local chairmen constituting the general grievance committee of your organization on Southern in June of 1960, which committee and the men who voted as to whether they would strike or not, were told that the strike would be called if they voted affirmatively on three separate and distinct issues, is that correct? A. Yes, sir.

Q. And yet, Mr. Gilbert, when you authorized the strike to commence on January 13, 1963, there was no separate ballot taken among and by the grievance committee, but they were simply told that a strike is being called and here

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are your strike instructions and this strike is being called because of alleged violations of vacation and mileage, is not that correct?

Aren't those the facts? A. Well, Mr. Zorn, in connection with that matter you just showed me was an agenda of a number of officers from this Brotherhood who had been

Henry E. Gilbert—for Plaintiff—Recalled—Cross

assigned to meet with our members on the Southern Railroad to advise them of the reason that the other item had been removed, and they were fully advised of this and they were fully advised before any strike was authorized.

Q. Mr. Gilbert, they were not told, were they, in any of these conversations, to forget entirely about any alleged violation or repudiation of Section IV of the diesel agreement in connection with your strike instructions, they were not told that, were they? A. They were told by the people attached to the list you showed me just a moment ago, the reason that the Section IV repudiation was not included in the strike issue, at that time.

The list of the meetings attached to that document you showed me a moment ago and the officers assigned to do the job—it is attached.

Q. And if I understand your testimony, the reason that, in your formal announcement of instructions for the strike

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call, and the instructions for the strike to commence as the date was later set on January 13, 1963, the reasons for the omission were entirely legal reasons, is that correct? A. Upon advice from our counsel, that is correct.

Q. Now, Mr. Gilbert, you have been president of this organization for how many years, sir? A. Since September 1, 1953.

Q. And prior to that I think you testified that you have been officer of this organization for many, many years? A. In some capacity for thirty-two years.

Q. And in connection with your experience you have had many occasions, have you not, to be concerned with and to get advice with respect to legal problems under the Railway Labor Act, is that correct? A. Oh, yes, I sure have.

Q. I would say, Mr. Gilbert, by reason of your experience, you are pretty familiar, are you not, with problems which

Henry E. Gilbert—for Plaintiff—Recalled—Cross

arise under the Railway Labor Act? A. Well, there are new ones crop up every day, notwithstanding the 32 years experience.

Q. Well, now, back in May of 1962, sir, you were having
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correspondence, were you not, with Mr. McCullum, with regard to a strike against the Southern Railway System? Is not that correct, sir? A. Yes, I believe, if my memory serves me correctly, I think there is some correspondence in evidence on that to that effect.

Q. Yes. And were you here yesterday when I was examining Mr. McCullum with regard to a letter from you dated May 22, 1962, defendants exhibit 14, a letter from you to Mr. Gilbert— A. From me to who?

Q. From you to Mr. McCullum—I beg your pardon, dated May 22, 1962. A. I remember your interrogation, yes.

Q. Well, now, was it not the fact that in May of 1962 Mr. McCullum had written to you, asking you to approve a strike or to authorize a strike against Southern at that time? A. That was in the making for quite some while, Mr. Zorn.

Q. But more specifically, I am not going into all of the correspondence, I am limiting my question for the moment, Mr. Gilbert, only to your letter of May 22 and the letter from Mr. McCullum which preceded that on May 7, 1962
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and my question is, and you may look at this letter to refresh your recollection—that he had written to you on May 7 and the purport of the letter, at least as I read it, Mr. Gilbert, is, that he was urging you to authorize and approve a strike against the Southern system. A. That is right, and understandable.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Q. Now, in connection with this, Mr. Gilbert, in your response to him, among other things, you said—and I am now reading from the third paragraph of that letter:

“While considerable merit may be contained in your proposal”—that is McCullum’s proposal—“to institute strike action, care must be exercised not to lose sight of the injunctive processes of the Courts under the Minor Grievance Doctrine of the United States Supreme Court in the Chicago River and Indiana Railway Case.”

Let me stop at that point.

On the basis of your experience, Mr. Gilbert, you know, do you not, that where there is a strike run which involves a controversy over a minor dispute, under the Chicago River Case the Supreme Court has held that that kind of a strike is enjoinable and that the remedy of the parties is before the Adjustment Board.

Is that not so?

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Mr. Kramer: I object. It calls for a legal conclusion. I would not object if the case would be accurately described and it could be if he would add one more fact, that is, if it is actually pending before the Board. If that fact is added, I would not object to the question.

Mr. Zorn: I would suggest that Mr. Gilbert, with all of his experience needs very little help from counsel in answering these questions.

The Court: The objection is overruled. The witness may answer.

Mr. Zorn: Would you like that question read?

The Witness: You will have to repeat the question so I will get it in its proper form.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

(The record is read.)

The Witness: In the category of Minor Grievances, that is correct. But in the Manion Case, which was rendered just shortly after that, it took the position that they had to be pending before they would be enjoined.

By Mr. Zorn:

Q. I think we are in agreement: For a carrier to get an injunction in a minor dispute case, a submission should be pending before the National Railroad Adjustment Board in a Minor Dispute or what you term a minor grievance, is that correct? A. Right.

But, we have seen some terrible warping of that minor

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situation as they have been presented to the first division.

Q. Now, Mr. Gilbert, at the very least, sir, doesn't the sentence I read to you indicate some concern on your part that the controversy on which Mr. McCullum was requesting strike approval might be held by a court to be a minor grievance or a minor dispute, and that the organization, if the submission were pending before the Adjustment Board, could or might be enjoined. Wasn't that your concern, sir? A. We always are concerned that we operate within the law. That is primary in our objective, as we operate this organization, and has been for 90 years.

Q. Well, Mr. Gilbert, is it not also your understanding, regardless of how the National Railroad Adjustment Board might or might not warp in some of its decisions—A. Just a moment, sir.

I did not make any accusation against the National Railroad Adjustment Board.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Q. I will withdraw that. That is what I understood you to say. Let me put the question another way, then. That is what I understood you to say. If I am wrong, I am sorry. A. No.

Q. Let me put it another way. As you understand the Minor Grievance or Minor Dispute Doctrine, is it not that

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the doctrine—forgetting for a moment the pendency of submission—but getting to the heart of the doctrine, itself, is not that doctrine a doctrine that, if there is a dispute over contract construction, over the interpretation of an agreement, that, under the Chicago River Case, the law, which you mentioned in your letter, is a minor dispute?

A. There has been some various about it, Mr. Zorn, and there are certain categories that I would have to admit, if you brought them by category, that that is true. But in our experience the scope of that argument that has associated itself with so many of the factors that the carriers have undertaken to categorize as minor, we almost have to take a look at the thing and then get advice from our attorneys to see how we ought to proceed to properly protect the members of our Brotherhood.

Q. Mr. Gilbert, you are too good a lawyer for me to argue with, so I will ask you a much simpler question. That question is this: You, as president, had had reports back as far as sometime in 1959, from Mr. McCullum, from your vice presidents, and you were familiar with the nature of the dispute between your organization and the Southern Railway, is that correct? A. Yes, sir. Yes, I was familiar with it.

Q. Yet being, I would say, completely familiar with that situation, nevertheless, as late as May 22, 1962, you ex-

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pressed to Mr. McCullum, who was urging strike approval,

Henry E. Gilbert—for Plaintiff—Recalled—Cross

some concern about whether or not such a strike might not be enjoined under the Minor Dispute or the Minor Grievance, as you call it, doctrine of the Chicago River case; is not that correct? A. In relation to that factor, that is true.

Q. And in that connection, Mr. Gilbert, you are and were at the time thoroughly familiar, I would say, with the history of this dispute which had started at least as far back as 1959, is that not so? A. Yes, sir. That I think was the earliest that we heard about this particular one.

Q. And in all of your correspondence with Mr. McCullum, both from him and from you and your correspondence with your own vice presidents, back and forth, and in all of the letters with which you were familiar, which had been exchanged between Mr. McCullum or anyone else in your organization with Southern Railway, is it not the fact that at no time prior to May 22, 1962, at least, there was never an assertion made anywhere that this dispute with Southern was a violation of Section Two, Seventh, was a violation of Section Six, or was a violation of Section Five of the Railway Labor Act? A. Oh, that is quite possible, Mr. Zorn.

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But there are many reasons for that.

Q. I am not interested in the reasons. A. I thought maybe the Court might be.

Q. You have Mr. Kramer who will be delighted, I am sure, to bring out the reasons. But mine is simply a factual question, and I think you have answered it, that no such assertion had been made, that Southern's conduct, the defendants' conduct, was a violation of either section Two Seventh, Section five or Section Six of the Railway Labor Act, at least until May 22, 1962, and then it was not made, is that correct? A. Well, there is a reason for that, Mr.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Zorn. I will have to repeat some of the things I have already said to emphasize it.

Q. Could you answer the question first as to whether or not such an assertion had been made? A. There had not been, because under the operation of the Railway Labor Act, the National Mediation Board had assumed jurisdiction and still had it, and we recognized the request that they had served on us for status quo. In the interim we recognized it and that is where we stood.

Q. But I am asking you, Mr. Gilbert, some factual questions with respect to the files that you were familiar with, dealing with this dispute.

Now, there were, were there not, many letters which are

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reflected in your files, some of which, portions of which have been introduced in evidence here, of correspondence in the first instance between Mr. McCullum and Mr. Tolle-son, that is correct. I think someone said there were hundreds of letters. I think Mr. McCullum said that. A. I think that is conservative.

Q. And in the hundreds of letters that Mr. McCullum wrote to Southern Railway, is it not the fact, regardless of the reason now, Mr. Gilbert, that he never asserted in connection with his charges of violation or repudiation or anything else, that he never asserted any violation of Section Two, Seventh of the Railway Labor Act, or of Section 5 or of Section 6 of the Railway Labor Act? A. I do not recall having seen any in that period of time.

Q. And your files, which are in evidence, would show that, would they not? A. If I had reviewed all of them, that is correct.

Q. Certainly, Mr. Gilbert, the memorandum of chronology, at the very least, goes up to what date?

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Give me defendants exhibit 1.

(Document handed to counsel.)

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By Mr. Zorn:

Q. I really want to connect factually your position in your May 22nd letter in which you expressed the concern you were just discussing, so I will not bother to go beyond that at the moment.

But, at least until that time in a controversy which had started in 1959, Mr. McCullum never asserted in any correspondence with Southern Railway System that there were statutory violations. He simply insisted that there was violation, repudiation and so on, but never used the words "statutory violation." A. I think that is correct.

Q. Nor did you, nor did your vice presidents make any such assertion, certainly in between the time your letter of May 22, 1962 was written from the very inception of this controversy? A. I did not understand whether you were making a statement or asking a question.

Mr. Zorn: Would you read it, please?

(The reporter read the question as above recorded.)

The Witness: Is that a question or a statement, Mr. Zorn? It seemed to me like a statement.

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By Mr. Zorn:

Q. Let me try it again. A. If it is a question, I can say.

Q. It is intended for a question. A. I can say thus far it had not propounded interrogation. I will say the record will indicate that no such intention was contained there.

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Mr. Zorn: May I have this marked for identification?

Deputy Clerk: Defendants exhibit 71 for identification.

(Defendants' exhibit 71 marked for identification.)

Deputy Clerk: A letter dated November 12, Local Chairman and Recording Secretaries, from R. L. McCullum.

By Mr. Zorn:

Q. Mr. Gilbert, I show you defendants exhibit 71 for identification, being a letter of November 12, 1962 under the letterhead—Brotherhood of Locomotive Firemen and Enginemen, Southern Railway System, First National Bank Building, Tuscumbia, Alabama, with the name Ralph L. McCullum, General Chairman, and it is addressed "Local Chairmen and Recording Secretaries, All Lodges, BFL&E, Southern Railway System Lines."

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And the copy indicates that it is signed by Mr. McCullum as General Chairman, and it indicates that copies went to you and to Mr. Jennings, your vice president.

Do you recall that letter, do you recall receiving a copy of it, sir? A. Well, I cannot say, Mr. Zorn, that I actually saw it upon its arrival at the Grand Lodge, but I have read it now.

Q. Well, is there any doubt in your mind that Mr. McCullum did send out such a letter? A. I have no reason to doubt that, no, sir.

Q. I would like to ask you, Mr. Gilbert, this letter is dated November 12, 1962, and it is addressed to "All Local Chairmen and Recording Secretaries."

Henry E. Gilbert—for Plaintiff—Recalled—Cross

Now, the Local Chairmen, are they not all members of the general grievance committee? A. Yes, sir.

Q. In the letter I inquired about earlier, Defendants' exhibit 20, which is the letter of November 27, 1962, which is also addressed to "All Local Chairmen" and which you described, Mr. Gilbert, as a strike instruction letter—do you recall that letter? A. Yes, sir, November 27, yes, sir, I do.

Q. You made it clear as to why, in the November 27th
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letter, on legal advice no reference whatever was made in the dispute with respect to Section IV of the Diesel Agreement. You have already testified to that. A. Yes.

Q. Now, just shortly before the November 27th, 1962 letter went out, in this letter of November 12, 1962 which I should like now to offer in evidence—

The Court: Any objection?

Mr. Kramer: No objection.

The Court: It is received without objection.

Deputy Clerk: Defendants exhibit 71 is received in evidence.

(Defendants exhibit 71 received in evidence.)

By Mr. Zorn:

Q. Mr. Gilbert, I think it might help you if I let you follow a copy of that. Is it not the fact then that just about two weeks prior to the November 27th letter, defendants' exhibit 20, Mr. McCullum, in advising or giving information to the Local Chairmen on November 12, 1962, informed them as follows—and I quote, beginning with the fourth paragraph: "This action of the Board"—

Henry E. Gilbert—for Plaintiff—Recalled—Cross

And the reference there so it is clear to the Court is determination by the Mediation Board of its efforts in case No. E-240, is that correct? A. Yes, that is my understanding.

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Q. All right.

“This action of the Board released the committee in order to exhaust every effort for a peaceful settlement. We decided to seek a preliminary injunction in the U. S. District Court for the District of Columbia. Each of you have a copy of my letter of September 21, 1962, letter addressed to Chairmen and Recording Secretaries, enclosing a copy of our complaint. We have been delayed in court. The carrier has since issued instructions that a fireman's temporary vacancy will not be filled unless an extra fireman is available. The extra list at several points is depleted. The carrier has arbitrarily refused to employ firemen. This merely means that firemen will not be used in the future, and this regardless of Section IV of the Diesel Agreement which provides”—

and then there is a quotation from Section IV of the Diesel Agreement.

That is followed with these statements:

“Vice president J. W. Jennings and I will make an effort to reach an understanding with assistant vice president L. G. Tolleson, beginning November 13. If—We can not reach agreement with Mr. Tolleson, we will attempt to reach agreement with President Brosnan. If we are unable to reach agreement with

Henry E. Gilbert—for Plaintiff—Recalled—Cross

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Management, we will attempt, through our attorneys, to speed up court action. Should both of these efforts fail, we shall be forced to authorize strike action. Each local chairman and other lodge officers should proceed immediately to have strike binders printed as you may receive a short notice."

That is the end of what I wanted to read to you, Mr. Gilbert.

I want to ask you this: That these very local chairmen who had voted in the 1960 strike and, as authorized by their strike vote, were told as late as November 12, 1962 by Mr. McCullum that the strike—if you read the entire letter—the strike is definitely connected, is it not, with the alleged violation of section four of the diesel agreement? A. No, sir, I did not understand it in that light.

Q. Well, now— A. Because, I might explain to you why, Mr. Zorn, they say that, if both of these efforts should fail—well, we did not fail yet in the second effort. It is still pending before this Court.

The strike that was authorized was authorized only on the matters not before this court.

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Q. Now, Mr. Gilbert, this action was instituted in this court sometime in September, 1962, this action in which you are seeking an injunction was instituted in this court by the filing of a complaint in September, 1962, is that correct? A. I believe that is so. I do not remember the exact date but it was somewhere in there, I am sure.

Q. And, as a matter of fact, my best recollection, Mr. Gilbert, that the argument on your organization's motion for a preliminary injunction took place on November 12,

Henry E. Gilbert—for Plaintiff—Recalled—Cross

1962, I believe the very day that this letter went out.
A. I really am not familiar enough with that date to say yes or no.

Q. Well, I am correct, the argument was on November 27. That is after this letter.

Now, my only question to you is, you have told us that for legal reasons you were advised, despite the fact that the initial strike call was based on three alleged violations, you were advised to call the strike only on two, that is correct, is it not? A. I was not advised. I made the determination.

Q. But you were advised by Mr. Heiss, I think, did you not tell us that you made that determination after con-

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sultation with Mr. Heiss? A. Yes, with Mr. Heiss.

Q. Mr. Heiss, I beg your pardon. A. Well, that was done previous, as I said. We understood that while this matter was pending in court, it would not be a proper subject to authorize a strike about, and we did not authorize one about it.

Q. But, nevertheless, is it not clear from this letter that during the pendency of this action which had been commenced in September of 1962, in advice to all his local chairmen, Mr. McCullum was emphasizing to them the importance of the alleged violations of section four of the Diesel Agreement, with very little or nothing in this letter with respect to any claims of vacation or mileage limitation? Isn't that the fact, from this letter? A. He is talking about violations, arrogant violations of our agreement, which is the mileage and the vacation, repudiation on the diesel agreement.

Q. Mr. Gilbert, regardless of legal reasons, would you not agree with me that so far as your local chairmen were

Henry E. Gilbert—for Plaintiff—Recalled—Cross

concerned, on the basis of all of the information which they had received and were receiving, and particularly with respect to the information contained in defendants exhibit 71, your men in the field, the local chairmen knew, did they

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not, that when they went out on strike, if the strike occurred, they were going out on strike not merely on the basis of any violation of vacation or mileage, but actually in addition, and most important, on claims of violation of Section Four, is not that the fact? A. It is not a fact, because we used every media known to us to advise them, including wires, and as I mentioned a moment ago, Mr. Zorn, we sent a Corps of Officers in the field and you have a copy of their agenda there, to advise them about the legal situation.

We do not expect our people in the field to be as fully aware of our obligations from the standpoint of the law as we are who have ready access to our attorneys, and we do our level best to keep them advised and we did in this instance, and I am sure they were fully cognizant of the fact that the repudiation of Section Four of the Diesel Agreement was not involved in this strike.

Q. Was not involved in this strike? A. Yes, sir.

Q. And, despite the fact, then, you say, Mr. Gilbert, that, at the time, the alleged violation or alleged repudiation of the Diesel Agreement was at fever heat, let me put it that way—when the strike vote was taken in June of 1960, and despite this letter immediately prior to the instructions

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to limit the strike called to just two items, are you saying, Mr. Gilbert, that these local chairmen honestly believed in their own minds that, when they went out on strike, they were going out on strike only technically and legally be-

Henry E. Gilbert—for Plaintiff—Recalled—Cross

cause of violation of vacation and mileage? A. Yes, sir.
And they were right to know that.

Mr. Kramer: No questions.

The Court: All right, you may step down, Mr. Gilbert.

(Witness excused.)

The Court: We will take a few minutes' recess at this time.

(Short recess was taken.)

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AFTER RECESS

Mr. Milton Kramer: That closes our direct case.
Your Honor.

The Court: All right.

Mr. Zorn: If Your Honor please, we have agreed upon a stipulation with Mr. Milton Kramer which I think will clear up completely some of the factual issues and confusion with respect to these seniority rosters and give you specifically, sir, the information that you really wanted, and Mr. Saul Kramer, my associate, will read that into the record.

The Court: All right.

Mr. Saul Kramer: (Reading)

"It is stipulated of the firemen hired since May 17, 1950, 178 are on the 1963 seniority rosters. No firemen were hired in 1963, 1962, 1961 or 1960. Only one fireman was hired in 1959."

Mr. Zorn: If Your Honor please, at this point I should like to make a motion, that is, the defendants

Motion to Dismiss

move for a dismissal of this action pursuant to Rule 41(b) of the Federal Rules on the ground that upon the facts and the law plaintiff has shown no right to the relief sought. Specifically we respectfully

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submit—and I have just five points that I will make briefly.

The Court: Let me ask you this: now this is a motion at the termination of the plaintiff's case?

Mr. Zorn: Yes, sir, that is intended.

The Court: Well, can the Court entertain a motion where evidence has been introduced by the defendant, and how is the Court going to draw the line between evidence introduced by the plaintiff and evidence introduced by the defendant? In other words, you agree, do you not, that the motion is predicated on the weighing of the testimony of the plaintiff in its most favorable light?

Mr. Zorn: That would be a motion on the plaintiff's case, correct, sir.

Now if you will let me just check with one of my experts, I think I can answer your question.

(Short pause in proceedings)

Your Honor, I don't think we have any problem. I can state now that on the basis of the way in which this case has been tried and on the evidence we have introduced in the course of the plaintiff's case, and in connection with the cross-examination of the plaintiff's witnesses, we are calling no witnesses.

The Court: All right.

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Mr. Zorn: And so I make the motion, then, on the basis of the record now before you, and we submit

Motion to Dismiss

therefore that the action should be dismissed, sir: first, because plaintiff has failed to establish any violation by the defendants of Section Two, Seventh, Section 5 and/or Section 6 of the Railway Labor Act; second, plaintiff has failed to establish a unilateral change in rates of pay, rules or working conditions of firemen, either to implement a Section 6 notice or in any other way; third, that this Court, under the authorities, lacks jurisdiction over the subject matter because the underlying controversy involves construction, interpretation and application of Section 4 of the Diesel Agreement and thus falls within the primary exclusive administrative jurisdiction of the National Railroad Adjustment Board; fourth, that plaintiff has failed to demonstrate that he will suffer any immediate irreparable harm or injury as a result of a denial of its application for this extraordinary remedy of a mandatory injunction; and fifth, that plaintiff, by twice threatening unlawfully to strike, and by failing to make every reasonable effort to settle this dispute by negotiations, through mediation, or through voluntary arbitration, plaintiff is barred from the relief here sought by Section 8 of the Norris-LaGuardia Act, and also under the equitable doctrine of unclean hands.

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That is the basis, Your Honor, of our motion to dismiss which, of course, we can develop much more fully if you desire.

Mr. Milton Kramer: Well, Your Honor, this has all been covered rather substantially in the briefs, not the first one, but points three, four and five have been rather fully covered by the briefs that were submitted by both sides in connection with our motion

Motion to Dismiss Denied

for preliminary injunction, and I think we would both be repeating ourselves if we discussed those three issues. With respect to the other two issues, I don't know whether I am to make argument now or answer Mr. Zorn's argument as he is the moving party. I would be glad to go ahead first, however.

The Court: All right.

Mr. Zorn: Your Honor, may I request a conference at the bench, please?

The Court: Yes.

(An off-the-record bench conference was had.)

The Court: For the purpose of the record, both sides having rested and the Court having before it a motion based on five points, the Court will deny the motion at this time and we will set twenty days within which plaintiff may file briefs supporting its position and twenty days after receipt of same by the defendant, they will answer, and the plaintiff then

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will have ten days for rebuttal. The Court at that time, having the benefit of the briefs of the respective parties, will take the time necessary to read the briefs and in the event that the Court is desirous of hearing oral argument, the same will be set and counsel for both parties will be notified.

Is there anything further?

Mr. Milton Kramer: Nothing further, Your Honor.

Mr. Zorn: Nothing further, Your Honor, that is satisfactory.

(Whereupon, at 11:35 a.m. the instant matter was concluded.)

Defendants' Exhibit 1**CHRONOLOGY OF EVENTS IN CONNECTION WITH
VIOLATION OF VACATION, MILEAGE LIMITA-
TION, AND DIESEL AGREEMENTS BETWEEN
BLF&E AND SOUTHERN RAILWAY SYSTEM**

JULY 3, 1959

Shortage of necessary firemen to cover all assignments on Atlanta Division south of Macon. Local chairman discussed matter with Superintendent. No action taken by management.

JULY 4, 1959

Two hostler helper assignments reported vacant for some time on Washington Division. All hostler helpers being used as firemen. Situation brought to attention of Superintendent by local chairman, but no reply made.

JULY 26, 1959

General Chairman McCollum informed International President that the company refused to hire furloughed Southern firemen to fill vacancies on certain points of the system. In some cases management was utilizing employees from other crafts in violation of BLF&E Agreement. General Chairman considers strike vote.

AUGUST 3, 1959

Needed firemen were hired or transferred from other seniority lists on Atlanta Division south of Macon. Extra engineer demoted because of fireman shortage restored to engineer's board.

OCTOBER 2, 1959 (correspondence)

General Chairman McCollum reports that Washington Division critically short of firemen. During months of July,

Defendants' Exhibit 1

August, September, vacancies were filled only through violation of mileage agreement. Director of Labor Relations announces he will employ no additional firemen on the Washington Division.

OCTOBER 6, 1959

Vice President W. E. Mitchell assigned to assist Committee.

OCTOBER 7, 1959

The claims of two yard firemen, Atlanta Division, south of Macon, off duty but available for duty for 100 miles at local freight rate were denied by divisional superintendent. Claims cover vacancies to which railroad porters were assigned. Decision appealed to General Manager on October 12—alleging violation of Section 4 of the Diesel Agreement, Article 26 (c)—(2) and Article 24 of the Schedule.

NOVEMBER 3, 1959

General Chairman McCollum in a letter rebukes Director of Labor Relations Tolleson for not replying to earlier requests for consideration of the employment of additional firemen on the Washington Division. General Chairman calls for compliance of Section 4 of the Diesel Agreement and Article 25 (e) of the Schedule.

DECEMBER 4, 1959

Director of Labor Relations replies, stating that:

1. Temporary shortage of firemen on the Washington Division had resulted from too many assigned vacations during June, July and August, 1959.

Defendants' Exhibit 1

2. Of the twenty-six furloughed firemen only nine would report—the remainder forfeiting seniority rights.
3. No employees filed complaints—apparently enjoying the extra mileage.
4. The seniority roster of the adjacent Danville Division, where ninety-seven firemen were cut off, be consolidated with the Washington Division roster.

DECEMBER 8, 1959

Vacations of two engineers and one fireman on the Washington Division cancelled because of "needs of the service."

DECEMBER 18, 1959

Local Chairman L. C. Clark, Jr., Lodge 246, appeals to Division Superintendent to employ additional firemen on the Atlanta Division south of Macon.

DECEMBER 21, 1959

Superintendent D. D. Strench denies that a shortage of firemen exists on that division.

JANUARY 12, 1960

Proposal to consolidate seniority rosters declined by General Chairman with counter-proposal to employ furloughed firemen of the Danville Division on the Washington Division under the terms of Article 26 (g) of the Schedule. The aforementioned provision would permit the fireman the option of designating his future seniority on one division, or the other, any time his seniority entitled him to a regular or extra board position on both seniority districts.

JANUARY 27, 1960

General Chairman McCollum appeals to General Manager W. H. Oglesby to employ additional firemen on the

Defendants' Exhibit 1

Atlanta Division south of Macon, in order to prevent a repetition of 1959 in which a shortage of firemen occurred and work agreements were violated.

FEBRUARY 3, 1960

C. B. Swan, Local Chairman, Lodge 625, Washington Division, informs General Chairman that if all bulletin assignments were filled, there would be one man short. Many firemen reporting back to work after eight hours' rest with only two men on vacation. Local chairman states that neither he nor the men want to consolidate seniority roster.

FEBRUARY 5, 1960

Tolleson informs General Chairman that barring discussion of seniority rosters, the files will be closed on the matter.

MARCH 9, 1960

Lawrenceburg local, Louisville Division, makes run without a fireman. Carrier makes no attempt to fill vacancy.

MARCH 12, 1960

Director of Labor Relations agrees to conference with BLF&E representatives on March 24, 1960, in Washington, D.C. The Director further denies that meeting would be in line with established grievance procedure, since no claims or complaints had been appealed to his office for rule violations.

MARCH 24-25, 1960

Conference with carrier ending with a proposal to become effective April 22, 1960, amending Article 26 (g) and Article 29 (c) of the Agreement dated January 1, 1959. Proposed amendments would, in substance, permit a fur-

Defendants' Exhibit 1

loughed fireman to accept employment on a second division without relinquishing seniority on his home division.

APRIL 5, 1960

Proposal signed after referendum of all members of the Southern Railway General Grievance Committee.

APRIL 27, 1960

Yard engine operated in Alexandria, Virginia Yard without fireman.

MAY 13, 1960

Conference held in Washington, D.C. between representatives of the BLF&E and Southern Railway to discuss violation of Section 4 of the Diesel Agreement and the general problem of the insufficient number of firemen at certain points on the Southern system. The spokesman for the carrier took the position that:

1. Everything possible was being done to get furloughed firemen to return to work from other divisions.
2. No new firemen would be employed.
3. No service would be tied up when firemen were not available.

MAY 16, 1960

All vacations cancelled for this date, also, June 1, 16 and 23 at Richmond, Virginia.

JUNE 1, 1960

Train Second No. 153 was operated Atlanta to Macon with a hostler helper being used as fireman. Hostler helper held no seniority as a fireman.

Defendants' Exhibit 1

JUNE 6, 1960

Brakeman used as fireman on local freight out of Richmond, Virginia. Brakeman held no seniority as a fireman.

JUNE 8, 1960

Train Second No. 153 was operated Atlanta to Macon with brakeman being used as a fireman.

JUNE 8, 1960

Extra south was operated Atlanta to Stockbridge with a hostler helper being used as a fireman. Hostler helper held no seniority as a fireman.

JUNE 15, 1960

Yard engine operated at Winston Salem, N.C., without a fireman.

JULY 15, 1960

Strike action authorized by the Southern Railway General Grievance Committee.

JULY 21, 1960

National Mediation Board notified that strike date set for 6:00 a.m., July 26, 1960, for reasons of carrier's refusal to employ enough firemen to fulfill the requirements of the Diesel Agreement.

JULY 22, 1960

National Mediation Board proffers its mediation services under provisions of Section 5 (b) of the Railway Labor Act. Identified as Case E-240.

NOVEMBER 4 & 11, 1960

Yard engine operated on the third trick at the Charleston Yard, Charleston, S.C., without fireman.

Defendants' Exhibit 1

NOVEMBER 15, 1960

Yard engine Charleston Yard operated two hours and 30 minutes without fireman.

NOVEMBER 18, 1960

Mediation Case E-240 begins hearings, Mediator Raymond B. Hawkins presiding, in Washington, D.C. Carrier promises to comply with Schedule Agreement.

NOVEMBER 23, 1960

Handling of Case E-240 recessed as requested by BLF&E.

JANUARY 17, 1961 (correspondence)

General Chairman McCollum relates of the following incidents which occurred since recess of mediation conference on November 23, 1960:

1. December 24, 1960—Local Freight Train No. 63 operated from Columbus, Mississippi, to Birmingham, Alabama, without a fireman. Qualified engineers at Birmingham were available.
2. January 16, 1961—Passenger Train No. 27 operated between Columbia and Spartanburg, South Carolina, without fireman. Several firemen assigned to freight service were available for duty at Columbia.
3. Fireman J. H. Bennett was used in "Emergency Service" out of Columbia, S. C., during his vacation period extending from January 1 to 21.

JUNE 20, 1961

Chairman McCollum reports the following:

1. Work train operated out of Birmingham on several occasions with Road Foreman of Engines acting as engineer.

Defendants' Exhibit 1

2. Road Foreman of Engines operated tobacco train between Winston Salem and Charlotte, North Carolina, several times during the year.
3. June 3, 1961—No fireman used on local freight run between Seven Mile Yard and Branchville on the Charleston Division.
4. June 9, 1961—No fireman used on Train No. 51, Seven Mile Yard to Columbia, South Carolina.
5. June 12, 1961—Road Foreman of Engines used as engineer on work train out of Chattanooga, Tennessee, on the Third District, CNO&TP.

JULY 1, 1961

Atlanta Division South of Macon. New switching assignment creates a shortage of four men at Macon, Georgia, with one fireman scheduled to start vacation on July 1.

JULY 1, 1961

South End Charlotte Division. Extra board six men short with six engineers scheduled to start vacations. Several engineers and firemen required to exceed mileage during last half of June.

JULY 14, 1961

Road Foreman of Engines used as engineer on Engine No. 2197 between Birmingham and Cameron, Alabama.

JULY 18, 1961

Director of Labor Relations Tolleson informed of firemen shortage on Appalachia District, Knoxville Division. Vacation rights of two firemen cancelled. Division Superintendent refuses to permit furloughed firemen of the Interstate Railroad to establish seniority on the Appalachia

Defendants' Exhibit 1

District. Regularly assigned firemen and engineers being used to fill firemen vacancies.

JULY 19, 1961

Train operated on the Carolina and North Western Railway from Hickory, North Carolina, to Lenoir, North Carolina, and return, without a fireman.

JULY 20, 1961

Fireman vacancy on yard assignment, Hickory, N.C., on the Carolina and North Western Railway not filled. Efforts of General Foreman at C&NW shop to secure a fireman was countermanded by Trainmaster.

AUGUST 1, 1961

No men on the extra board on the Atlanta Division south of Macon. The extra board calls for five men. Practically all engineers and firemen exceeding mileage in violation of Article 25 of the Schedule Agreement.

AUGUST 4, 1961

Filling of advertised vacancy depletes firemen's extra board which calls for three men.

AUGUST 14, 1961

Diesel engine weighing less than 90,000 pounds (weight on drivers) used in yard service at Dalton, Georgia, was temporarily replaced by road engine. Assistant Superintendent promised to secure fireman in order to comply with terms of Diesel Agreement. Records reveal that no fireman was ever called, even though men were available from Atlanta or Krannert, Georgia.

Defendants' Exhibit 1

AUGUST 22, 1961

Engineer P. D. Drum, C&NW, called back from vacation to protect an extra from Hickory, North Carolina, to Lenoir, North Carolina, and return.

AUGUST 29, 1961

Engineer P. D. Drum again recalled from his vacation for roundtrip on extra between Hickory and Lenoir.

SEPTEMBER 10, 1961

Road Foreman of Engines serves as engineer on derrick train out of Birmingham to Cameron.

SEPTEMBER 21, 1961

Firemen's Extra Board on the Carolina and North Western Railway at Hickory, North Carolina, is exhausted. Brakemen, shop employees, and Southern Railway firemen being used on C&NW.

SEPTEMBER 28, 1961

Southern Railway Fireman G. E. Elmore was used on Carolina and North Western run between Hickory and Lenoir, North Carolina. Also, L. L. Smith was called while on vacation and worked four days. Another Southern Fireman, G. W. Wiseman used on the C&NW property.

OCTOBER 1, 1961

Road Foreman of Engines, K. D. Johnson, used as an engineer on July 14 and September 10 (cited above) was involved in the derailment of five or six cars while serving as an engineer, Norris Yard at Bessemer.

OCTOBER 2, 1961

Engineer dies on Carolina and North Western with extra board exhausted. Local Chairman informed by Superin-

Defendants' Exhibit 1

tendent that Company instructions are to hire no firemen. Southern Fireman J. D. Hill used on this date.

OCTOBER 4, 1961

Southern Railway Fireman G. W. Wiseman called for service on the C&NW.

OCTOBER 9, 1961

Fireman Wiseman again used in C&NW service.

OCTOBER 11, 1961

Reports that the Atlanta Division south of Macon will have no fireman on the extra board between October 11 and October 14 and only one fireman thereafter. Mileage regulation requires the assignment of five firemen.

OCTOBER 11, 1961

A C&NW crew made a roundtrip between Hickory and Lenoir without a fireman. On this trip it was necessary for the conductor to ride the engine and assist the engineer in performing some of the duties ordinarily performed by the fireman.

OCTOBER 13, 1961

Southern Railway Fireman G. E. Elmore used on C&NW run between Hickory to Lenoir, North Carolina, and return.

OCTOBER 17, 1961

Southern Fireman G. W. Wiseman used on Carolina and North Western Railway.

OCTOBER 18, 1961

Fireman Wiseman used on C&NW.

Defendants' Exhibit 1

OCTOBER 24, 1961

Fireman Wiseman used on C&NW.

OCTOBER 26, 1961

Fireman G. E. Elmore used on C&NW.

OCTOBER 26, 1961

Superintendent, Atlanta Division, cancels vacations for two enginemen. Vacations scheduled for November 1.

OCTOBER 31, 1961

C&NW extra, Hickory to Lenoir and return, operated without fireman.

NOVEMBER 1, 1961

C&NW Trains 60 and 61 operated without a fireman.

NOVEMBER 1, 1961

C&NW extra, Hickory to Lenoir and return, operated without fireman.

NOVEMBER 2, 1961

C&NW extra, Hickory to Lenoir and return, operated without a fireman.

NOVEMBER 2, 1961

C&NW Trains 60 and 61 operated without a fireman.

NOVEMBER 3, 1961

C&NW extra, Hickory to Lenoir and return, operated without a fireman.

NOVEMBER 3, 1961

C&NW Train No. 61 operated without a fireman and only one brakeman.

Defendants' Exhibit 1

NOVEMBER 4, 1961

C&NW Train No. 60 operated without a fireman.

NOVEMBER 6, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

NOVEMBER 6, 1961

C&NW No. 61 operated out of Hickory, North Carolina, to York, South Carolina, without a fireman.

NOVEMBER 7, 1961

C&NW No. 60 operated out of York to Hickory without a fireman.

NOVEMBER 7, 1961

C&NW extra operated without a fireman.

NOVEMBER 8, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

NOVEMBER 8, 1961

C&NW Train No. 61 operated Hickory, N. C., to York, S. C., without a fireman.

NOVEMBER 9, 1961

C&NW Train No. 60 operated York to Hickory without a fireman.

NOVEMBER 9, 1961

C&NW extra operated without a fireman.

NOVEMBER 10, 1961

Southern Fireman Elmore used on C&NW extra.

Defendants' Exhibit 1

NOVEMBER 10, 1961

C&NW Train No. 61 operated Hickory to York without a fireman.

NOVEMBER 13, 1961

C&NW Train No. 61 operated Hickory to York without a fireman.

NOVEMBER 13, 1961

Southern Fireman G. W. Wiseman used on C&NW Extra Hickory to Lenoir and return.

NOVEMBER 14, 1961

C&NW Train No. 60 operated York to Hickory without a fireman.

NOVEMBER 14, 1961

C&NW Extra operated without a fireman.

NOVEMBER 15, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

NOVEMBER 15, 1961

BLF&E requests National Mediation Board to reconvene hearings of NMB Case E-240.

NOVEMBER 16, 1961

C&NW Train No. 60 operated from York, S. C., to Hickory, N. C., by fireman without an engineer.

NOVEMBER 16, 1961

C&NW extra operated without a fireman.

NOVEMBER 17, 1961

Southern Fireman G. E. Elmore used on C&NW extra.

Defendants' Exhibit 1

NOVEMBER 20, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

NOVEMBER 21, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

NOVEMBER 22, 1961

Southern Fireman G. W. Wiseman used on C&NW extra.

DECEMBER 15, 1961

Mediation of Case E-240 resumed in Washington, D. C., with Mediator Robert Roadley presiding.

DECEMBER 16, 1961

Local No. 86 was operated on the Atlanta Division North between Inman Yard (Atlanta) and Cleveland, Tennessee, without a fireman. The three firemen assigned to the extra board were on vacation, but nevertheless working during their vacation period. One fireman was called for run, but his call was annulled by the division superintendent.

DECEMBER 18, 1961

Mediator Roadley recesses NMB Case E-240 as a result of conflicting evidence presented by both sides concerning violations of agreements.

DECEMBER 20, 1961

In a letter addressed to L. G. Tolleson, Vice President, Labor Relations, General Chairman McCollum expresses the feeling that it would be useless to reactivate Mediation Case E-240. General Chairman inquires as to Southern's intentions of complying with Firemen's Agreement.

JANUARY 10, 1962

Superintendent D. H. MacLeod authorized operation of East Local, Birmingham to Atlanta without a fireman.

Defendants' Exhibit 1

JANUARY 12, 1962

General Chairman McCollum informs Vice President Tolleson that Superintendent T. D. Moore, Jr. of the Atlanta Division had ordered a local freight known as the *Arkwright Turn* operated without a fireman on January 10. Fireman assigned to run was temporarily delayed by ice and snow on way to work. Local was run without delaying long enough for fireman to report or for calling another fireman.

JANUARY 23, 1962

Tolleson replies to McCollum's correspondence of December 20, denying that Superintendent had cancelled call allegedly given to fireman for Local Freight No. 86 on December 16, 1961. The Director of Labor Relations intimated that firemen were available but were deliberately "dodging the run."

JANUARY 29, 1962

General Chairman McCollum relates that Fireman H. Barber, Birmingham Division, spent his vacation period from January 1 to 21, 1962, in the following manner:

1. January 4—Call on West End Birmingham Division, Birmingham to Columbus, Georgia.
2. January 5—Return trip Columbus to Birmingham.
3. January 11—Birmingham Terminal yard job CY-1.
4. January 18—West End Bessemer job.

FEBRUARY 2, 1962

McCollum informs Southern management that the Appalachia District, Knoxville Division, has thirteen assigned jobs requiring twenty-six firemen and engineers. Since January 1, 1962, there were only twenty-five men on both lists to fill the regular assignments plus any extra trains,

Defendants' Exhibit 1

emergencies, vacations, etc. No fireman had been permitted to work his regular assignment during the month of January.

FEBRUARY 6, 1962

Labor Relations Director Tolleson denies that Arkwright Turn on Atlanta Division South was operated without a fireman.

FEBRUARY 15, 1962

Local Chairman L. C. Clark, Jr. informs carrier that during the latter half of February, the Macon Yard extra board, according to mileage provisions, was short by two firemen and deficient by three firemen after February 19 when a bulletined job was to be assigned. Clark complained, also, that a regularly assigned fireman in the Brunswick Yard was denied his legal time off in accordance with the provisions of Section 4 (b)—Note 2 of the Five Day Work Week Agreement, because of insufficient manpower.

APRIL 8, 1962

Two firemen's vacations cancelled on Richmond Division. No firemen assigned to extra board to protect extra work and for vacation relief.

APRIL 17, 1962

Local Chairman A. W. Bretz notifies Superintendent of St. Louis Division that engineers' extra list was exhausted and additional men were needed to comply with rules.

APRIL 30, 1962

General Chairman McCollum wires Vice President Tolleson concerning the cancelling of seven engine service employees' vacation on the Atlanta Division.

Defendants' Exhibit 1

APRIL 30, 1962

General Chairman McCollum addresses a letter to F. C. Harrison, General Chairman of the Brotherhood of Locomotive Engineers, requesting the BLE to join the BLF&E Committee in a movement to force Southern management to honor Vacation Agreement. Points out that four yard engineers and three yard firemen, Atlanta Division, vacations to be cancelled May 1.

MAY 3, 1962

Tolleson replies to McCollum contending that Section 6 of Vacation Agreement authorizes carrier to cancel vacation. Southern intends to deny vacation rights of seven Atlanta Division men under terms of Section 6.

MAY 5, 1962

Harrison replies to McCollum declining to join with BLF&E in movement. Harrison concedes to Tolleson's position and asks McCollum instead to increase mileage through revision of mileage agreement.

MAY 7, 1962

McCollum informs Harrison that to concede to the carrier's position would make a nullity of Vacation Agreement. McCollum refuses to revise mileage limitation rule.

MAY 10, 1962

Local Chairman L. C. Clark, Jr., Atlanta Division South, informs Superintendent T. D. Moore, Jr. that as of May 12, 1962, the extra board would be two men short due to mileage rule and vacation. By July 1 the extra board should be exhausted when two men will be assigned to Rayonier Paper Mill job taken over for six months from Atlantic Coast Lines.

Defendants' Exhibit 1

MAY 11, 1962

Six vacancies bulletined on Washington Division which would create a shortage of six men when assigned. In addition, four engineers and four firemen due to commence vacation on June 1.

MAY 16, 1962

St. Louis Division. Shortage of two men on extra board due to mileage regulations and vacation.

MAY 22, 1962

In correspondence to R. L. McCollum, the International President refers to the injunctive processes of the courts under the "minor grievance" doctrine established in the Chicago River & Indiana Railway case in relation to possible strike action. Mentions also the "clean hands" of theory which the Southern Railway (the plaintiff) would be subjected to by the courts in a petition by the carrier for a permanent injunction.

MAY 22, 1962

Work train operated on the Washington Division without a fireman, brakeman or flagman.

MAY 22, 1962

North Local operated from Greensboro, North Carolina, to Monroe without a fireman. Fireman deadheaded from Greensboro for return trip May 24.

MAY 22, 1962

Local Freight No. 79 was operated Greensboro, North Carolina, to Mt. Airy, North Carolina, without a fireman.

Defendants' Exhibit 1

JUNE 1, 1962

Atlanta Division South. One vacation cancelled as of this date, with road extra list short at least two men and yard list short two men.

JUNE 2, 1962

Trainmaster W. E. Curlee serves as fireman in Charlotte Yard, thus violating Diesel Agreement. Mr. Curlee is also accused of failing to bulletin vacancies at Airline Junction, which violates Article 26-B-6 of the Schedule Agreement.

JUNE 4, 1962

Southern Railway and BLF&E closes files on National Mediation Board Case E-240.

JUNE 5, 1962

Director of Labor Relations Tolleson referring to a letter of the General Chairman, dated June 1, denies any knowledge of all enginemen's vacations being cancelled on the Memphis Division during the month of June 1962. Claims the Division Superintendent could rightfully exercise such prerogative anyway, and men denied vacation and feel aggrieved should file grievance under terms of Article 32 of the Agreement.

JUNE 6, 1962

Charlotte Division North undermanned to the extent of six men on road list. Men working seven days a week in violation of the Five Day Work Week Agreement on the Division.

JUNE 6, 1962

Six additional men needed on Charlotte Division South. Enginemen frequently being called for other than regular assignments.

Defendants' Exhibit 1

JUNE 6, 1962

Train No. 57 operated from Richmond to Danville without a fireman.

JUNE 7, 1962

Train No. 56 operated from Danville to Richmond without a fireman.

JUNE 12, 1962

General Chairman McCollum referring to Tolleson's letter of June 5, 1962, charges the management announced policy of employing no new firemen represents a premeditated intent to arbitrarily violate the Diesel, Vacation and Mileage Agreements. McCollum denies carrier's right under Section 6 of Vacation Agreement to cancel vacations due to designed shortages of manpower.

JUNE 12—

L.C. Lodge 745 advised Superintendent, Charlotte Division, that on June 2, that a trainmaster placed himself as a fireman on an engine in Charlotte Yard to avoid doubling an available fireman. Also, that trainmaster has refused to bulletin firemen vacancies at Airline Junction.

JUNE 20—

Management advised by Acting General Chairman of extreme shortage of firemen on Atlanta Division, South, and that shortage of firemen at Macon Yard was causing cancellation of scheduled vacations.

JUNE 20—

Management advised of shortage of firemen on C&NW Railway and that extra 2225-2126 and No. 55 were operated without firemen on June 14.

Defendants' Exhibit 1

JUNE 22—

Management advised of the shortage of firemen at Coapman Yard, St. Louis Division, and that scheduled vacations were being cancelled.

JUNE 25—

Management advised of shortage of firemen and cancellation of vacations at Atlanta Terminal.

JULY 2—

Management advised of shortage of firemen on the Mobile Division.

JULY 3—

Management advised that Train No. 7 was instructed by Assistant Superintendent to leave Atlanta without a fireman on June 29.

JULY 3—

Management advised of shortage of firemen on Spartanburg Extra List.

JULY 3—

General Chairman protests use of clerks as firemen at Hayne or Charlotte Yard.

JULY 6—

General Chairman protests violation of Vacation Agreement.

JULY 13—

Management advised of shortage of firemen on Atlanta Division, South.

Defendants' Exhibit 1

JULY 19—

General Chairman agreed to a conference on Carrier's Section 6 Notice and proposed August 14 as date.

JULY 20—

Mr. E. C. Thompson advised Mr. L. G. Tolleson as to status of Carrier's request for mediation re Carrier's Section 6 Notice.

JULY 20—

Carrier advised that mileage regulations on Atlanta Division, South, were being violated due to carrier imposed shortage of firemen. Also, that a train porter was used as a fireman on July 2, 3, 4, and 5, at Rayonier.

JULY 23—

Management advised of shortage of firemen and cancellation of vacations on St. Louis Division.

AUGUST 2—

Employees decline a carrier request for conference on Section 6 Notices of the carrier *restricted* to proposals applying only to firemen.

AUGUST 7—

Four Switchmen used as firemen on July 4, 11, and 15, in Spartanburg Yard.

AUGUST 20—

General Chairmen again protested shortage of firemen on Atlanta Division, South, and use of train porter as a fireman at Rayonier.

AUGUST 22—

A local freight between Seven Mile and Branchville operated without a fireman on August 15.

Defendants' Exhibit 1

AUGUST 22—

General Chairman protested to management because of an extra local freight between Hickory and Lenoir, North Carolina, operating without a fireman on August 9, and 16. Also, No. 61, Hickory to York without a fireman on August 15.

AUGUST 22—

General Chairman again protests shortage of firemen and violation of mileage regulations on St. Louis Division.

AUGUST 22—

Radio controlled diesel units tended by officials and E.M.D. factory men operated out of Bull's Gap at an earlier date.

AUGUST 22—

Work train operated without a fireman on N.A. District, Birmingham Division, August 6 to 10. General Chairman protests to management.

AUGUST 31—

Protest to management on shortage of firemen and violation of Diesel and Mileage Agreements on Washington Division. Work train operated on July 30 without a fireman.

SEPTEMBER 4—

Firemen file claims for violation of Vacation Agreement on the Southern.

SEPTEMBER 5—

Carrier agrees as to responsibility for enforcement of mileage regulations by issuing of bulletins threatening discipline for violation. Also, Carrier has paid some time claims for violation of such regulations.

Defendants' Exhibit 1

SEPTEMBER 12—

General Chairman protests:

August 24—Fireman relieved on Train No. 55 before trip was completed—two hours without a fireman.

August 25—Train No. 54 without a fireman.

August 25—Train No. 55 without a fireman.

Sept. 5—Train No. 60 without a fireman.

Sept. 6—Train No. 61 without a fireman.

Sept. 7—Train No. 61—Hickory to Newton without a fireman (All on Carolina and North Western Railway).

SEPTEMBER 14—

Shortage of firemen on extra lists of Charlotte Division, South, and Atlanta Terminal protested by General Chairman.

OCTOBER 6—

3:15 P.M. Chamblee Switcher operated without a fireman on September 30.

OCTOBER 9—

Two (2) work trains operated for one week on Columbia Division, without a fireman.

October 6—Local 65 and 66 from Columbia to Granetville without a fireman.

October 6—Trains 71 and 72 from Columbia to Pacelot without a fireman.

Defendants' Exhibit 1

OCTOBER 15-19—

Yard engine without a fireman at Somerset, Kentucky on 2nd District, CNO&TP.

OCTOBER 20—

Yard assignment in Forrest Yard, Memphis, from 3:00 P.M. to 7:55 with several trainmasters acting as firemen.

OCTOBER 30—

General Chairman again advises of extreme shortage of firemen at Coapman Yard, East St. Louis.

OCTOBER 31—

General Chairman advises that two (2) yard assignments at Charlotte Yard worked without firemen on October 13 and 15 respectively.

NOVEMBER 9—

General Chairman protests shortage of firemen on Atlanta Division, South. Train No. 91, Fort Valley Local operated without a fireman on November 7, 8, and 9.

NOVEMBER 9—

General Chairman protests violation of Diesel, Vacation, and mileage agreements on Richmond Division.

NOVEMBER 9—

Train 153 from Macon to Brunswick without a fireman.

NOVEMBER 8—

Carriers issue ultimatum regarding use and hiring of firemen on GS&F Railway (Southern). One train Valdosta to Jasper without a fireman on November 6.

Defendants' Exhibit 1

NOVEMBER 7—

General Chairman protests:

Train No. 153 Selma to Mobile without a fireman on November 1.

Seven P.M. yard engine at Selma operated without a fireman on November 5.

NOVEMBER 7—

General Chairman protests Yardmaster's instructions to caller *not to call* firemen for yard assignment at Oakdale.

NOVEMBER 7—

All scheduled vacations for yard firemen and trainmen in month of November, 1962, at Macon were cancelled by bulletin.

NOVEMBER 7—

General Chairman protests:

October 1—11:59 P.M. yard job at Winston Salem worked 12 hours and 42 minutes without a fireman.

October 13—2:30 P.M. job worked without a fireman.

October 15 and 16—11:59 P.M. job worked without a fireman.

NOVEMBER 8—

General Chairman protests:

November 6—Extra Jasper Turn out of Valdosta without a fireman.

November 8—General Chairman advises of continued violation of mileage regulations in that an engineer and fireman were allowed to make

Defendants' Exhibit 1

5300 and 5900 miles respectively, due to shortage of firemen.

NOVEMBER 23—

General Chairman advised management that shortage of firemen on Columbia Division was resulting in violation of existing agreements with BLF&E. Also, that "Carolina Special". Passenger Train No. 27-28 was operated Columbia to Spartanburg and return on October 12, 1962, without a fireman.

NOVEMBER 23—

Shortage of firemen on Charlotte Division, South and carrier in violation of agreements with BLF&E. Train No. 72-71 operated out of Atlanta on November 10 with trainmaster acting as fireman.

NOVEMBER 23—

Shortage of firemen and violation of existing agreements on Charleston Division. The "Seven Mile" Branchville Local operated with trainmaster acting as fireman on November 20, 1962.

NOVEMBER 23—

Shortage of firemen and violation of existing agreements on the 2nd District of the C. N. O. & T. P. Railway. Road Foremen of Engines used as fireman on Somerset Yard Engine, November 9, 12, 13, 14, 15 and 16, 1962. Road Foremen of Engines used as fireman on Oakdale yard engine on November 17, 1962.

NOVEMBER 23—

Superintendent V. R. Valentine has declined request of Local Chairman that furloughed road firemen be employed to work as yard firemen at Somerset and Oakdale.

Defendants' Exhibit 2

(Letterhead of General Grievance Committee, Brotherhood
of Locomotive Firemen and Enginemen, Southern
Railway System, Tusculumbia, Ala.)

October 2, 1959
File 14032

Mr. H. E. Gilbert, President
B. of L. F. & E.
318 Keith Building
Cleveland 15, Ohio

Dear Brother Gilbert:

A question has been discussed with your office through correspondence and telephone conversation with you while in St. Paul, relative to the shortage of firemen on the Atlanta Division South of Macon. For your ready reference, we enclose a copy of letter mailed to Local Chairman Clark July 27, 1959, and August 3, 1959. You will note that copies of this correspondence were mailed to you. The situation on the Atlanta Division South of Macon has been alleviated by the transfer of firemen. This was finally accomplished through handling with General Manager Oglesby and Director of Labor Relations Tolleson.

Another similar condition has arisen on the Washington Division of the Southern Railway. We enclose a copy of letter from Local Chairman C. B. Swan, dated July 4, to Superintendent T. D. Moore, Jr. Mr. Moore has not replied to this letter as of this date. After this was referred to me, a letter was addressed to Director of Labor Relations Tolleson August 27. Mr. Tolleson has not replied to that letter as of this date. However, the question was discussed in personal conference with Mr. Tolleson September

Defendants' Exhibit 2

15, 1959. Mr. Tolleson advised that he had not replied to my letter of August 27, as he had not completed his survey of the manpower situation on the Washington Division: Mr. Tolleson's action in making no reply to our letter is nothing but a total disregard for the rules because he could make a survey of the Washington Division in five minutes. The whole matter of delaying this issue is the fact that he was waiting for vacation periods to be over and hoping that additional men would not be needed.

Local Chairman Swan advised me this date that the situation is now fairly well in hand because vacations have been completed and sufficient men are available. However, in view of the fact that Mr. Tolleson advised me in conference that he did not intend to employ additional firemen on the Washington Division, and he further stated that the Organization had no right to make a grievance when firemen were not available, it is evident that we will have to take stern action to settle this matter.

This same shortage will again appear during the month of November and December because of extra passenger trains that are run during the latter part of the year as well as additional vacations that are assigned during the month of December.

A conference date is being requested with Mr. Tolleson to discuss this matter and I am requesting that you assign an officer to assist our Committee to handle this matter to a conclusion. The Washington Division was critically short of firemen during the month of July, August and September. At times we needed at least nine men to fill vacancies. During the first half of September, the following vacancies existed for firemen and there were no firemen available to be assigned.

Defendants' Exhibit 2

Passenger Train No. 38 cut off assignment
 Passenger Train No. 36 cut off assignment
 Passenger Train No. 46 cut off assignment
 Two hostler helper assignments
 Five vacancies on the freight extra list

There were nine vacancies for which no firemen were available. Mr. Tolleson insisted that the agreement was being complied with because these jobs were actually filled with men from our seniority list. However, the jobs were filled by pulling regular men, doubling on other assignments, exceeding mileage. It is our position that the carrier must employ sufficient men to comply with Article 25 (e) of the agreement which provides that passenger assignments will be assigned between 3800 and 4800 miles, freight lists 3200 to 3800 miles and the extra board to be regulated between 2600 and 3100 miles when sufficient firemen are available, but the extra board must always have sufficient firemen so that 3800 miles is not exceeded.

I will await your reply to this letter before requesting a conference date with the carrier in Washington.

Fraternally yours,

/s/ R. L. McCOLLUM
 General Chairman

CC: Mr. C. B. Swan, LC 625
 RLM:wc
 Enc.

Defendants' Exhibit 3

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Savannah, Georgia)

May 19, 1960

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen and Enginemen
318 Keith Building
Cleveland 15, Ohio

Dear Sir and Brother:

Reference to your letter of October 6, 1959, accompanying Grand Lodge temporary file in connection with the dispute between our General Grievance Committee and the Southern Railway management, involving the carrier's refusal to hire sufficient firemen (helpers) to protect the needs of the service.

Pursuant thereto, General Chairman McCollum and I met the carrier's Mr. L. G. Tolleson, Director of Labor Relations, in his office in Washington, D. C. on March 25, 1960, and handled this dispute; also a dispute involving the carrier operating the Lawrenceburg local on March 19, 1960, without a fireman (helper).

As I understand the facts:

- (1) There exists a shortage of road firemen (helpers) on a number of carrier's divisions (particularly on the Washington Division); thus they are required to exceed their mileage regulations, are deprived of their vacations, etc.; which subject Brother McCollum has handled with the carrier, requesting that sufficient men be hired to properly operate provisions of the Firemen (helpers) Schedule Agreement. Which the carrier has declined to do.
- (2) On March 9, 1960, the fireman (helper) assigned to the Lawrenceburg local (Louisville Division) layed

Defendants' Exhibit 3

off. Two (2) firemen (helpers) were assigned to the Division extra board (the mileage calls for three). however, they were not available, so the carrier operated this assignment without a fireman (helper).

In discussing dispute (1), Mr. Tolleson stated a total of 740 firemen (helpers) were furloughed on the Southern Railway system, who he felt should be given preference to service, before new firemen (helpers) were hired; while he was agreeable to working out an agreement permitting these men to work and establish seniority on other seniority districts under the circumstances, however, he was not agreeable, at this time, to the hiring of additional firemen (helpers).

Regarding (2), Mr. Tolleson stated the local officers after exhausting all efforts to secure a fireman (helper) to protect the Lawrenceburg local on March 9th, operated this assignment without a firemen (helper); Mr. Tolleson contended the carrier could do nothing more under the circumstances, and would in the future, do the same thing under the same circumstances.

After discussing these disputes at length, the attached memorandum of agreement was drafted, providing for the establishment of seniority for furloughed firemen (helpers) working on other than their home seniority districts. Which was submitted for approval of the general grievance committee, and consummated by Mr. Tolleson and Brother McCollum to become effective on April 22, 1960. Mr. Tolleson assured Brother McCollum and myself he would do all possible to recall sufficient furloughed firemen (helpers) thereunder, to adequately protect the service; and under date of May 3, 1960, Mr. Tolleson addressed the attached circular (with copy of the agreement) to the furloughed firemen (helpers), comprising them of the service needs and inquiring if they were interested in availing themselves of the opportunity to work. I fully subscribe to the agreement's objectives, offering work first to the furloughed firemen (helpers) many of which are members of the BLF&E.

Defendants' Exhibit 3

Under date of April 28, 1960, you forwarded me the following telegram:

"PURSUANT TO TELEPHONE CONVERSATION WITH PHILLIPS. PLEASE ARRANGE TO MEET GENERAL CHAIRMAN MCCOLLUM IN WASHINGTON, D. C. ON MAY 12 TO DEAL WITH SITUATION INVOLVING OPERATING OF LOCOMOTIVES ON SOUTHERN RAILWAY WITHOUT FIREMEN. MCCOLLUM BEING NOTIFIED ACCORDINGLY AND REQUESTED TO SET CONFERENCE DATE WITH TOLLESON."

Pursuant thereto, General Chairman McCollum and I met Mr. Tolleson on May 13, 1960.

As I understand the facts:

The carrier operates two (2) regular yard assignments at Alexandria, Virginia (Washington Division); on April 26, 1960, an extra yard shift was used to handle a Bendix new type coupler test. Account no yard engineer being available, the fireman (helper) on one of the regular shifts was called to work as engineer on this extra shift. The firemen (helpers) yard extra board which supplies men for the yard at Alexandria is located 154 miles away, at Monroe, Virginia; however, no men were available on this extra board and the carrier then operated the shift without a fireman (helper). No shortage of firemen (helpers) exists on this seniority district, which carries several furloughed men.

The foregoing subject was discussed together with the fireman (helper) shortage which still existed; Mr. Tolleson stated he was doing all possible to prevail upon the furloughed firemen (helpers) to return to service (on other districts), and that he felt his efforts would soon result in having sufficient firemen (helpers) in service to fully protect the carrier's needs. However, he reiterated that he was

Defendants' Exhibit 3

not agreeable, at this time, to hire new firemen (helpers), and that the service would not be tied-up when firemen (helpers) were not available.

Brother McCollum and I reiterated our position that the Schedule Agreement specifically required the use of a fireman (helper) on the locomotives operated in the instant cases, and that these assignments should have been cancelled when no fireman (helper) was available therefor.

Mr. Tolleson advised the instant disputes over service being operated without firemen (helpers) involves the application of the Schedule rules, and when such rules are violated the carrier would pay the penalty (in these cases no firemen (helpers) were available to protect these jobs); further, that trains have in the past been operated without a full crew complement, and he expressed concern at our (Brother McCollum and I) being "so worked up" over these incidents.

These are most difficult situations for General Chairman McCollum, and I can understand the pressure generated from the membership on these disputes, especially due to the national negotiations on the carrier's demands to remove the firemen (helpers) from diesel-electric locomotives in freight and yard service. However, I know of no way to bring the requisite pressure on the carrier to force the hiring of firemen (helpers), except through the medium of the Brotherhood's strike procedure; in which event I anticipate we will become involved in litigation, and perhaps an injunction which could seriously handicap the Brotherhood in the event of a national strike over the diesel-electric firemen (helpers) situation.

Your opinion on these matters will be appreciated.

Yours fraternally,

/s/ W. E. MITCHELL
Vice President

cc: Mr. R. L. McCollum

Defendants' Exhibit 4

MEMORANDUM AGREEMENT

Between

**SOUTHERN RAILWAY COMPANY,
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY,
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,
NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
THE NEW ORLEANS TERMINAL COMPANY,
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,
ST. JOHNS RIVER TERMINAL COMPANY**

and

FIREMEN, HOSTLERS AND OUTSIDE HOSTLER HELPERS

Represented by the

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS.

• • •

IT IS HEREBY AGREED that Article 26 (g) and Article 29 (c) of the Agreement of January 1, 1959 are superseded and cancelled, and the following is adopted as Article 26 (g):

(g) SENIORITY ON TWO SENIORITY DISTRICTS.

A fireman cut off on his home seniority district who accepts employment on another seniority district (road or yard) of any of the railroads parties hereto will establish seniority under the rules as a new man on such second seniority district. He will notify the officer in charge of his home seniority district that he is accepting employment on another seniority district, identifying such district. After establishing seniority on a second seniority district, he will be subject to and governed by all the rules in the Agreement in the same manner as all other employees holding seniority on such district, and:

Defendants' Exhibit 4

(1) He will not forfeit seniority on his home seniority district because of standing for service there while simultaneously standing for service on the second seniority district;

(2) He must keep his address on file with the officer in charge of his home seniority district; he will be notified when he stands for service on his home seniority district but will not be required to protect service there while working on his second seniority district unless he elects within thirty (30) days to return to his home seniority district, in which case he will give appropriate notice to the officers in charge of both seniority districts;

(3) However, he may at any time, by giving six (6) days' advance notice in writing to the officers in charge of both seniority districts, displace a junior man on a regular assignment on his home seniority district;

(4) If he elects to return to his home seniority district as permitted in (2) or (3) above, a fireman will not forfeit his seniority on his second seniority district, but can thereafter exercise seniority on his second seniority district only when cut off on his home seniority district;

(5) If cut off on both seniority districts, he will be subject to recall on both. If recalled to service on his home seniority district, he will not forfeit seniority on his second seniority district but will thereafter not be permitted to exercise seniority on his second seniority district unless and until he is again cut off on his home seniority district.

(6) The foregoing provisions will be applicable to all firemen who now hold seniority as such on more than one seniority district.

NOTE: See Memorandum of Understanding dated June 23, 1941, page 134, concerning firemen accumulating seniority in two transportation ranks.

Defendants' Exhibit 4

This Memorandum Agreement shall become effective
April 22, 1960.

ACCEPTED AND AGREED

For the Carriers:

(Signed) L. G. TOLLESON
Director of Labor Relations,
Southern Railway Company,
The Cincinnati, New Orleans and
Texas Pacific Railway Company,
The Alabama Great Southern
Railroad Company,
New Orleans and Northeastern
Railroad Company,
The New Orleans Terminal Company,
Georgia Southern and Florida
Railway Company,
St. Johns River Terminal Company.

For the Employees:

(Signed) R. L. McCOLLUM
General Chairman,
Brotherhood of Locomotive Firemen
and Enginemen.

Washington, D. C.,
File H-291-18-58.

Defendants' Exhibit 5

(Letterhead of Southern Railway System,
Washington 13, D. C.)

May 5, 1960

Dear Sir:

This letter is being written to firemen who are cut off on Southern Railway System Lines.

There recently developed a need for firemen on certain seniority districts. Where firemen are needed the Company desires to give preference to cut off firemen, and has entered into an agreement with the Brotherhood of Locomotive Firemen and Enginemen whereby a fireman (road or yard) cut off on one seniority district who accepts employment on another seniority district (either road or yard) will not lose his seniority at home. Copy of the agreement is enclosed for your information.

I am informed that firemen are now or soon will be needed on:

- | | |
|---|-----------------------------------|
| (1) Washington Divn.—
road, yard. | (7) GS&F—road. |
| (2) Richmond Divn.—
yard (North and
South Ends). | (8) StJRT—yard. |
| (3) Charlotte Divn.—yard
(North End). | (9) Asheville Divn.—yard. |
| (4) Columbia Divn.—yard. | (10) Louisville Divn.—road. |
| (5) Charleston Divn.—
road. | (11) Mobile Divn.—road,
yard. |
| (6) Atlanta Divn.—road
(North End); road,
yard (South of Ma-
con). | (12) Chattanooga Term.—
yard. |
| | (13) CNO&TP (1st Dist.)—
yard. |

Defendants' Exhibit 5

Please fill out and sign the enclosed card, mailing it to me to show whether you are interested in working on the above seniority districts, indicating your preference.

If you are interested in working on any seniority district other than listed above, please so indicate on the enclosed card.

Yours very truly,

/s/ L. G. TOLLESON

Director of Labor Relations.

Defendants' Exhibit 6

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

May 27, 1960
File 14032

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

During our conference May 13, in your office relative to action of Supt. Moore in operating a yard engine on the Washington Division April 27, 1960, without a fireman:

During our conference you furnished Vice-President W. E. Mitchell and me with a copy of your letter dated May 5, 1960, which you mailed to furloughed firemen on the Southern Railway System. This letter advised of the divisions wherein shortages of firemen existed and you also enclosed a self-addressed post-paid postal card that the firemen might advise if they cared to work on other divisions and if so, to state their choice: We appreciate your efforts in this connection, as this seems a good plan to notify furloughed firemen of the places where they might work. You also furnished each of these firemen a copy of the agreement relative to a fireman holding seniority on a second seniority district which became effective April 22, 1960.

During our discussion of the immediate shortages at certain points, you advised that you would comply with Section 4 of the Diesel Agreement and Article 25(e) of the Firemen's Agreement, "If The Carrier has available fire-

Defendants' Exhibit 6

men". It is regretted that you did not see fit to take immediate action to provide sufficient firemen to comply with the agreement. We must therefore advise, that any future failure on the part of the Carrier to comply with Section 4 of the Diesel Agreement, will be opposed with every means at our command.

Very truly yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:bz

cc: Mr. W. E. Mitchell

Mr. H. E. Gilbert

Defendants' Exhibit 7

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

June 9, 1960
File 14032

Members
GGC—BLF&E
Southern Railway System

Dear Sirs and Brothers:

You have received information relative to a shortage of firemen on certain divisions, which has resulted in vacations being canceled and two instances where trains were operated without a fireman.

Our Committee was assisted by Vice President W. E. Mitchell in handling this matter on two occasions with Director of Labor Relations Tolleson. We have been unable to secure a definite commitment from the carrier that they intend to employ firemen to fill the shortages. Section 4 of the Diesel Agreement provides that a fireman or helper taken from the seniority list of firemen will be employed on all locomotives. This with a few exceptions but none apply in the cases hereinafter referred to or any that have been referred to this office. It appears that we will be required to take a definite stand which will no doubt involve the balloting of our Committee on this matter. Information has been furnished from several divisions where brakemen, switchmen, hostler helpers, yardmasters, etc. have been used as firemen. This does not comply with Section 4 of the Diesel Agreement.

We enclose a form dated June 9, and a self-addressed envelope that you may furnish this office with information as to shortages, reasons therefor, and the names of persons used other than firemen, which does not comply with Section 4 of the Diesel Agreement. Will you please complete the form and return? You will be furnished other forms as needed or required.

The carrier operated the Lawrenceburg Local on the Louisville Division without a fireman March 9, 1960. This matter was referred to me by Local Chairman Caple and was discussed in personal conference with Director of Labor

Defendants' Exhibit 7

Relations Tolleson March 24. You are familiar with the agreement signed which became effective April 22, permitting firemen to hold seniority on two districts. Vice President Mitchell assisted the Committee in the handling of this matter.

A yard engine was operated on the Washington Division at Alexandria, Virginia without a fireman April 27. This matter was likewise discussed with Mr. Tolleson with the assistance of Vice President Mitchell May 13. We were unable to secure a definite commitment as to what action the carrier would take to employ sufficient men in the event the agreement effective April 22, 1960 did not accomplish the purpose.

This matter was discussed in personal conference with President Gilbert and Assistant President Phillips in Cleveland, Ohio, June 7. President Gilbert feels that it might be a part of wisdom to wait a few days and see if the agreement of April 22, will resolve the problem. This is also a difficult time for us in this matter because of the notice served by the carrier for rule changes November 2, 1959. It is possible that we may secure some changes as result of our counter proposal to the carrier which would help alleviate this condition by making it financially unsound for the carrier to continue to work with a shortage of firemen. If you have any comment to make, as a member of our General Grievance Committee, as to what handling we should give this matter, please advise. Otherwise, you will be advised of the future handling and in event it is necessary to vote our Committee, that will also be done.

Please return the attached form furnishing the information requested and make any additional comment as to the situation on your Division.

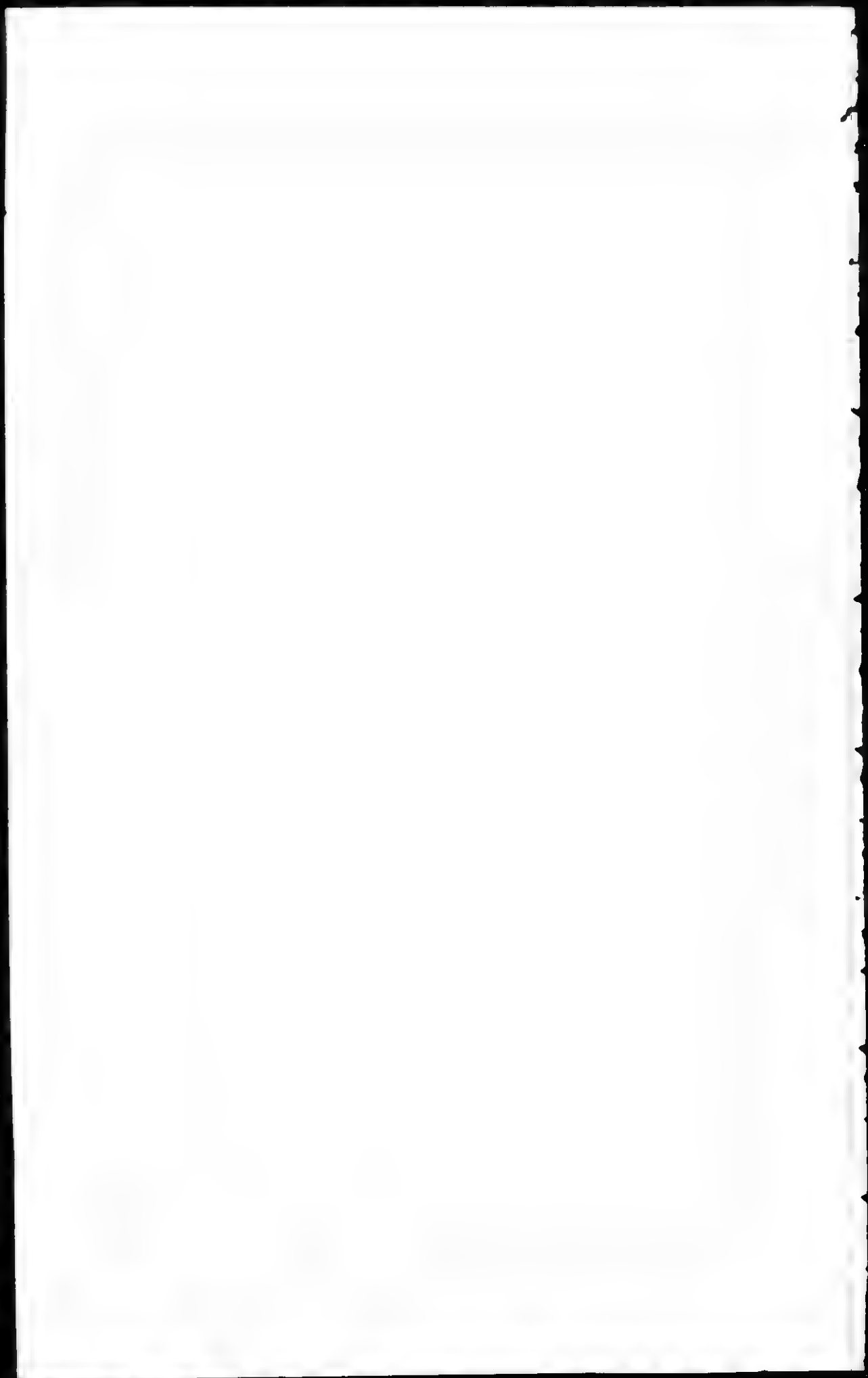
Thanking you for your interest in this most important matter, I remain

Fraternally yours,

/s/ R. L. McCOLLUM
General Chairman

BLM:wc
Enc.

CC: Mr. W. E. Mitchell
Mr. H. E. Gilbert



MANPOWER REPORT . . . FILE 14032
June 9, 1960

[illegible]

Make any additional comments here or on the back of this form.

Date _____

Local Chairman
Lodge No. _____

5-7-8

311a

Defendants' Exhibit 9

(Western Union Telegram Form)

LLC491 AA251

A LLS466 LONG NL PD AR ATLANTA GA 11

L G TOLLESON

1960 JUL 11 PM 8 38

DIRECTOR OF LABOR RELATIONS SOUTHERN
RAILWAY CO WASHDC

REFERENCE DISPUTE BETWEEN OUR GENERAL
GRIEVANCE COMMITTEE AND SOUTHERN RAIL-
WAY MANAGEMENT INVOLVING REFUSAL OF
CARRIER TO HIRE SUFFICIENT FIREMEN TO PRO-
TECT NEEDS OF SERVICE IN ORDER TO ADMIN-
ISTER AND PERPETUATE BLF&E CONTRACTS ON
THIS PROPERTY. YOUR REFUSAL TO HIRE FIRE-
MEN SERIOUSLY DEPLETES AND IN TIME WILL
ARBITRARILY ELIMINATE THE FIREMENS CRAFT
ACCORDINGLY THE GENERAL GRIEVANCE COM-
MITTEE HAS VOTED TO SET A STRIKE OF EM-
PLOYEES REPRESENTED BY THE BLF&E IN FUR-
THER PROSECUTING THIS DISPUTE WHICH AC-
TION HAS BEEN APPROVED BY OUR PRESIDENT
H E GILBERT HOWEVER BEFORE PROCEEDING
FUTHER I SUGGEST ANOTHER IMMEDIATE CON-
FERENCE WITH YOU IN A FINAL EFFORT TO
PEACEBLY RESOLVE THIS DISPUTE. IF YOU ARE
AGREEABLE TO THIS PROCEDURE PLEASE CON-
TACT MCCOLLUM WHO WILL BE IN WASHINGTON
FOR JULY 13 CONFERENCE WITH MR. FORD AND
HE WILL SO ADVISE ME OF CONFERENCE DATE
SET. COPY TO GILBERT AND MCCOLLUM

W E MITCHELL VICE PRESIDENT BLF&E.

Defendants' Exhibit 8

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Savannah, Georgia)

June 17, 1960

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen and Enginemen
318 Keith Building
Cleveland 15, Ohio

Dear Sir and Brother:

This has reference to our General Chairman R. L. McCollum of the Southern Railways' letter to you dated June 9, 1960 (File 14032) regarding the situation existing on that carrier precipitated by its refusal to hire sufficient firemen (helpers) to protect the needs of the service. A copy of which was forwarded me.

In view that the agreement effective April 22, 1960, providing for the transfer of furloughed firemen (helpers) from other seniority districts to protect the service and prevent these shortages, apparently not being the remedy in this situation: I suggest that Brother McCollum prepare a strike ballot to the members of the general grievance committee pursuant to our laws; outlining this situation, and if the committee approves the fixing of a strike in order to further prosecute this matter, that same be authorized by you.

It is by now apparent that this most serious situation will not improve; and I feel sure the carrier's adamant refusal to hire firemen (helpers) will not be changed, short of a strike threat, thus, under these circumstances, we can do nothing more.

Yours fraternally,

/s/ W. E. MITCHELL

cc: Mr. R. L. McCollum

Defendants' Exhibit 9

(Western Union Telegram Form)

LLC491 AA251

A LLS466 LONG NL PD AR ATLANTA GA 11

L G TOLLESON

1960 JUL 11 PM 8 38

DIRECTOR OF LABOR RELATIONS SOUTHERN
RAILWAY CO WASHDC

REFERENCE DISPUTE BETWEEN OUR GENERAL
GRIEVANCE COMMITTEE AND SOUTHERN RAIL-
WAY MANAGEMENT INVOLVING REFUSAL OF
CARRIER TO HIRE SUFFICIENT FIREMEN TO PRO-
TECT NEEDS OF SERVICE IN ORDER TO ADMIN-
ISTER AND PERPETUATE BLF&E CONTRACTS ON
THIS PROPERTY. YOUR REFUSAL TO HIRE FIRE-
MEN SERIOUSLY DEPLETES AND IN TIME WILL
ARBITRARILY ELIMINATE THE FIREMENS CRAFT
ACCORDINGLY THE GENERAL GRIEVANCE COM-
MITTEE HAS VOTED TO SET A STRIKE OF EM-
PLOYEES REPRESENTED BY THE BLF&E IN FUR-
THER PROSECUTING THIS DISPUTE WHICH AC-
TION HAS BEEN APPROVED BY OUR PRESIDENT
H E GILBERT HOWEVER BEFORE PROCEEDING
FURTHER I SUGGEST ANOTHER IMMEDIATE CON-
FERENCE WITH YOU IN A FINAL EFFORT TO
PEACEBLY RESOLVE THIS DISPUTE. IF YOU ARE
AGREEABLE TO THIS PROCEDURE PLEASE CON-
TACT MCCOLLUM WHO WILL BE IN WASHINGTON
FOR JULY 13 CONFERENCE WITH MR. FORD AND
HE WILL SO ADVISE ME OF CONFERENCE DATE
SET. COPY TO GILBERT AND MCCOLLUM

W E MITCHELL VICE PRESIDENT BLF&E.

Defendants' Exhibit 10

(Western Union Telegram Form)

BDA003 1245P EDT JUL 21 60 CTB065

CT CLE106 PD FAX CLEVELAND OHIO 21 1224P EDT

E C THOMPSON, SECY

NATIONAL MEDIATION BOARD WASHDC

BROTHERHOOD OF LOCOMOTIVE FIREMAN AND
ENGINEMEN HAS AUTHORIZED STRIKE BY EM-
PLOYEES REPRESENTED ON SOUTHERN RAIL-
WAY FOR 6:00 AM TUESDAY MORNING JULY 26,
1960. ACCOUNT CARRIER REFUSING TO HIRE FIRE-
MEN IN ORDER THAT DIESEL AGREEMENT RE-
QUIRING EMPLOYMENT OF FIREMEN ON DIESELS
CAN BE FULFILLED. YOU WILL RECALL ASSIS-
TANT PRESIDENT PHILLIP OF OUR ORGANIZA-
TION DISCUSSED THIS MATTER WITH YOU YES-
TERDAY BY TELEPHONE. PLEASE ACCEPT THIS
TELEGRAM AS 72 HOURS NOTICE IN SITUATIONS
OF THIS KIND

H E GILBERT.

Defendants' Exhibit 11

(Western Union Telegram Form)

RDA005 1117A EDT JUL 22 60 WA210

PD WASHINGTON DC 22 1103A EDT

E C THOMPSON, EXECUTIVE SECRETARY,
NATIONAL MEDIATION BOARD

(RD)

WASHDC

YOUR WIRE 21ST QUOTING ONE FROM PRESIDENT GILBERT OF BLF&E. SAYING HE HAS AUTHORIZED STRIKE FOR 6:00 A.M., TUESDAY, JULY 26, 1960, ACCOUNT CARRIER REFUSING TO HIRE FIREMEN IN ORDER THAT DIESEL AGREEMENT REQUIRING EMPLOYMENT OF FIREMEN ON DIESELS CAN BE FULFILLED. MR. GILBERT'S CHARGE IS UNFOUNDED. AS EVIDENCE OF THIS, I AM SENDING YOU, BY MAIL, COPY OF DIRECTOR OF LABOR RELATIONS TOLLESON'S LETTER OF JULY 13TH TO VICE PRESIDENT MITCHELL, BLF&E, AND COPY OF THE AGREEMENT REFERRED TO THEREIN. MATTER DISCUSSED IN CONFERENCE MR. MITCHELL AND THE GENERAL CHAIRMAN ON JULY 19TH AT WHICH WAS POINTED OUT HAVE ALREADY GIVEN EMPLOYMENT TO SOME THIRTY-EIGHT CUT OFF FIREMEN AND OTHER CUT OFF FIREMEN WILL BE GIVEN EMPLOYMENT TO FILL NEED FOR FIREMEN ON ALL SENIORITY DISTRICTS IN DUE TIME. IN CONFORMITY WITH RECENT AGREEMENT. THREAT OF STRIKE IS NOT

Defendants' Exhibit 11

ONLY UNCONSCIONABLE, BUT ILLEGAL. UNDER CIRCUMSTANCES, CARRIER HEREBY INVOKES SERVICES OF MEDIATION BOARD TO AFFORD IT AN OPPORTUNITY TO BRING THE FACTS TO LIGHT

FRED A BURROUGHS ASSISTANT VICE PRESIDENT LABOR RELATIONS SOUTHERN RAILWAY SYSTEM

TO WHOM IT MAY CONCERN:

The undersigned hereby certifies that this is a true and complete copy of the original telegram in this matter concerning NMB Case No. E-240 which is kept in the office of the National Mediation Board, a public office of the United States not pertaining to a court.

In witness whereof I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D.C. this 19th day of February, 1963.

/s/ E. C. THOMPSON
E. C. Thompson
Executive Secretary

Defendants' Exhibit 12

(Western Union Telegram Form)

RDA005 907A EDT JUL 25 60 NHC040 NHC003 SPOC065
CTB267

CT CLB476 PD DL FAX CLEVELAND OHIO 22 231P
EDT

E C THOMPSON, EXECUTIVE SECRETARY
NATIONAL MEDIATION BOARD WASHDC

FROM YOUR WIRE DATE, OBSERVE BOARD HAS
ASSIGNED QUESTION OF HIRING FIREMEN ON
SOUTHERN RAILWAY AS CASE E-240. ORGANIZA-
TION, THEREFORE, HAS POSTPONED STRIKE
DATE SET FOR JULY 26 AND WILL ADVISE WHO
WILL REPRESENT US WHEN MEDIATOR IS AS-
SIGNED

H E GILBERT.

Defendants' Exhibit 13

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

November 28, 1961
File 14032 V-1

Mr. H. E. Gilbert, President
B. of L. F. & E.
318 Keith Building
Cleveland 15, Ohio

Dear Brother Gilbert:

With further reference to our previous discussion relative to the question of the employment and use of firemen. Our most recent serious violation of the Agreement by the carrier was discussed with you at the Hamilton Hotel, Washington, D. C., November 9. Subsequent to that time, I wrote you relative to the matter on the C&NW in my letter November 13.

As result of our discussion, you addressed a letter November 15, 1961, to Mr. E. C. Thompson, Secretary National Mediation Board, requesting that the National Mediation Board promptly reassign a Mediator or close their files in order that the dispute may be handled further under the procedures of the Railway Labor Act without undue delay. Since writing you November 13, this matter has been handled with Mr. Tolleson and it appears the carrier does not intend to comply with the Agreement.

The following was called to my attention by Local Chairman G. N. Ruff as to the action of the carrier between the dates of November 6 and 22:

Nov. 6—Southern Fireman G. S. Wiseman used on C&NW extra.

Nov. 6—No. 61 operated out of Hickory, North Carolina to York, South Carolina without fireman.

Nov. 7—No. 60 operated out of York to Hickory without fireman.

Defendants' Exhibit 13

Nov. 7—Extra C&NW train operated without fireman.

Nov. 8—Southern Fireman G. S. Wiseman used on C&NW Extra.

Nov. 8—Train No. 61 operated Hickory to York without a fireman.

Nov. 9—Train No. 60 operated York to Hickory without a fireman.

Nov. 9—C&NW Extra operated without fireman.

Nov. 10—Southern Fireman Elmore used on C&NW Extra.

Nov. 10—No. 61 operated Hickory to York without fireman.

Nov. 13—No. 61 operated Hickory to York without fireman.

Nov. 14—No. 60 operated York to Hickory without fireman.

Nov. 13—Southern Fireman G. S. Wiseman used on Extra Hickory to Lenoir and return.

Nov. 14—C&NW Extra operated without fireman.

Nov. 15—Southern Fireman G. W. Wiseman used on C&NW Extra.

Nov. 16—Fireman Anthony used as engineer on No. 60, York to Hickory, without an engineer. (Fireman Anthony was set up at York because of the engineer becoming ill and actually this train was operated from York to Hickory by the fireman without an engineer.)

Nov. 16—C&NW Extra operated without fireman.

Nov. 17—Southern Fireman Elmore used on C&NW Extra.

Nov. 20—Southern Fireman G. S. Wiseman used on C&NW Extra.

Defendants' Exhibit 13

Nov. 21—Southern Fireman G. W. Wiseman used on C&NW Extra.

Nov. 22—Southern Fireman G. W. Wiseman used on C&NW Extra.

There is very little I can add to that included in my letter November 13, to you. However, we enclose a copy of the two manpower report items completed by Local Chairman G. N. Ruff and a copy of work messages addressed to part of the above listed crews, dated November 6, 12, 13, 16, and 17, 1961. You will note the crews were advised to operate without a fireman.

This is merely given to you as information to emphasize the fact that we must take some positive action in the immediate future. I recognize the fact that you have written the Mediation Board requesting that they promptly assign a Mediator but we should not relax for one moment until that is done.

Fraternally yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc
CC: Mr. W. E. Mitchell
Mr. G. N. Ruff

Defendants' Exhibit 14

(Letterhead of Locomotive Firemen and Enginemen,
Cleveland 15, Ohio)

May 22, 1962

Mr R L McCollum
General Chairman, BLF&E
Southern Railway
First National Bank Bldg
Tuscumbia, Alabama

Dear Sir and Brother:

This will acknowledge receipt of your May 7 letter and enclosures further in connection with a dispute with management of the Southern Railway involving proper application of the current National Vacation Agreement, May 17, 1950, Diesel Agreement, and the matter of hiring sufficient firemen-helpers to adequately man the service.

It is observed that the situation has improved to some slight extent during the past few months but the shortage of firemen-helpers on many Divisions still remains critical. Noted also are your suggestions for immediate relief from carrier malpractices under the National Vacation Agreement.

While considerable merit may be contained in your proposal to institute strike action, care must be exercised not to lose sight of the injunctive processes of the courts under the "minor grievances" doctrine of the United States Supreme Court in the Chicago River & Indiana Ry case. Since the National Work Rules dispute is rapidly reaching a climax, question arises as to the wisdom of seeking remedy on the Southern Ry through this method at the present time despite the apparent justification for same. In evalu-

Defendants' Exhibit 14

ating the situation from a procedural standpoint, strike action premised on the assumption that the carrier would seek injunctive relief might possibly provide a solution to the problem.

Theoretically, petitioners for injunctive relief must come into the courts with "clean hands". While it would not be too difficult for the Southern Ry to obtain a temporary order, proof must be submitted to the courts before such an order can be made permanent showing the petitioner as defenseless against irreparable loss and/or damage if the other party is not restrained. In light of the record presently established on your property, some question arises as to the ability of the Southern Railway to convince the courts that they have "clean hands".

Since Vice President J. J. Murray still has the assignment of dealing with the basic problem contained in your letter, a copy of this communication has been transmitted to him as a matter of information. Copies of your May 17 letter have also been forwarded, as per your suggestion to the other interested operating chief executives with the thought that they might desire to comment on the Southern Railway's latest attempts to render the National Vacation Agreement meaningless. During the interim, the entire matter will be taken under advisement and any conclusion reached with respect to remedial measures will be promptly furnished.

Fraternally yours,

/s/ H. E. GILBERT

CC: B E DAVIDSON, GCE-BLE
W P KENNEDY, Pres-BRT
L J WAGNER, Pres-ORC & B
J J MURRAY, VP-BLF & E
L C CLARK, LC-246

Defendants' Exhibit 15(a)

(Letterhead of National Mediation Board, Washington)

June 12, 1962

Mr. Lawson G. Tolleson
Asst. Vice President—Labor Relations
Southern Railway System
c/o Southern Railway Building
Washington 13, D. C.

Dear Mr. Tolleson:

This has reference to your mediation application dated May 29, 1962 covering your Section 6 notice of September 16, 1960 served on the Brotherhood of Locomotive Firemen and Enginemen.

Attached is a copy of a letter addressed to the Board from Mr. H. E. Gilbert dated June 4, 1962 in which he alleges that the conferences have not been concluded on the property. Please give us the benefit of your comments on Mr. Gilbert's letter.

Very truly yours,

/s/ E. C. THOMPSON
E. C. Thompson
Executive Secretary

cc-to: Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen
and Enginemen
318 Keith Building
Cleveland 15, Ohio

Defendants' Exhibit 15(b)

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Cleveland, Ohio)

June 4, 1962

Mr. E. C. Thompson
Executive Secretary
National Mediation Board
Washington, D. C.

Dear Mr. Thompson:

This has reference to your two communications of May 31 advising that management of the Southern Ry System has filed application for mediation services on behalf of certain subsidiary lines in a dispute with the BLF&E involving carrier's Section 6 notice of September 16, reading in part as follows:

- "A. Eliminate all agreements, rules, regulations, interpretations and practices which require the employment or use of a fireman (helper) on other than steam power in any class of service;
- B. Establish a rule to provide that management shall have the unrestricted right to determine when and if a fireman (helper) shall be used on other than steam power in any class of service; and
- C. The foregoing will be applicable only through the process of attrition, but hereafter Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever."

Defendants' Exhibit 15(b)

As a matter of information, the above quoted Section 6 notice was served by the Southern Ry management as a rebuttal to the BLF&E notice of September 7, 1960, which is now in national handling and identified as a part of NMB Case A-6700.

Conferences on both notices were held on the property on October 10, 1960, without arriving at an amicable disposition of either notice. At that time the carrier was advised that the BLF&E was not agreeable to the proposed changes and the meeting was adjourned with the understanding that conferences would be resumed at the request of either party at a mutually acceptable time and place. Since conferences have not been concluded on the property, petition of Southern Ry management is, therefore, improper at this time. In any event, if the NMB assumes jurisdiction, the BLF&E reserves the right to formally request the mediation services of your Board in connection with our September 7, 1960 Section 6 notice.

Very truly yours,

/s/ H. E. GILBERT

cc: R L McCollum, GC-Sou Ry

Defendants' Exhibit 16

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Cleveland, Ohio)

July 20, 1962

Mr L G Tolleson
Assistant Vice President
Labor Relations
Southern Railway System
Southern Railway Building
Washington 13, D C

Dear Sir:

This will acknowledge receipt of your July 16 letter further in connection with the carrier's rebuttal to Section 6 notice of September 16, 1960, involving the BLF&E and Southern Railway System.

As previously advised, you desire conference with General Chairman McCollum and it is suggested that you arrange direct in the usual manner.

Very truly yours,

/s/ H. E. GILBERT

CC: R L McCollum, GC-Sou Ry

Defendants' Exhibit 17

(Western Union Telegraph Form)

1962 AUG 13 PM 12 09

LLD125 RA166

NSA095 NS SFA024 PD TUSCUMBIA ALA 13 928A
CST

L G TOLLESON

SOUTHERN RAILWAY CO WASHDC

SUPERINTENDENTS ARBITRARILY VIOLATING
MILEAGE AGREEMENT AND CANCELLING VACA-
TIONS. N.A. DISTRICT TRAIN OPERATED AUGUST
6, 7, 8, 9, 10 WITHOUT FIREMAN., BRAKEMAN, OR
CONDUCTOR. ROADFOREMAN AND TRAINMAS-
TERS USED. I CANNOT MEET YOU AUGUST 14, AS
AGREED RESUMING NEGOTIATIONS YOUR SEP-
TEMBER 16, 1960 SECTION 6 NOTICE. WHY NEG-
TIATE AGREEMENT WHEN YOU LACK HONESTY,
DECENCY AND INTEGRITY FULFILL PRESENT
AGREEMENT! PRESENT TIME CAN BE BETTER
SPENT PREPARING STRIKE OR COURT ACTION.
JOINT MR E C THOMPSON, H E GILBERT, J W
JENNINGS, C O HICE, G B REED, W E LUDWIG

R L MCCOLLUM

6 7 8 9 10 14 16 1960 6.

Defendants' Exhibit 18

(Letterhead of National Mediation Board, Washington)

August 14, 1962
Case No. A-6766

Mr. L. G. Tolleson, Assistant Vice President L.R.
Southern Railway System
P. O. Box 1808
Washington 13, D.C.

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland, Ohio

Gentlemen:

Reference is made to exchange of correspondence concerning application for mediation filed by Mr. Tolleson on May 29, 1962 in dispute between the following carriers and the Brotherhood of Locomotive Firemen & Enginemen on the carriers' proposals of September 16, 1962.

Southern Railway Company
The Cincinnati, New Orleans & Texas Pacific Railway
Company
Harriman & Northeastern Railroad Company
The Alabama Great Southern Railroad Company
New Orleans & Northeastern Railroad Company
The New Orleans Terminal Company
Georgia Southern & Florida Railway Company
St. Johns River Terminal Company

In Mr. Gilbert's letter to this office of July 16, 1962, copy of which was sent to Mr. Tolleson with our letter of July

Defendants' Exhibit 18

20, 1962, Mr. Gilbert stated his position that the BLF&E Section 6 notice of September 7, 1960 is a part of the dispute and must be handled concurrently with the carrier's notice of September 16, 1960. To date Mr. Gilbert has not filed application for mediation on his Section 6 notice of September 7, 1960. Mr. Gilbert objected to the docketing of Mr. Tolleson's application on the grounds that further conferences had been arranged and conferences had not been concluded.

On August 13, 1962 General Chairman McCollum addressed a telegram jointly to Mr. Tolleson, the undersigned and Messrs. Jennings, Hice, Reed, and Ludwig stating he could not meet with the carrier on August 14th as previously agreed to resume negotiations on the carrier's september 16, 1960 Section 6 notice. We have also received telegram dated August 13, 1960 from Mr. Tolleson addressed jointly to General Chairman McCollum and the undersigned in which he requested the Mediation Board to docket his application for mediation and assign a mediator as promptly as possible on the grounds Mr. McCollum has refused to comply with the provisions of the Railway Labor Act by continuing negotiations on the carriers' notice.

Since this request of the carrier is in accordance with the language of Section 6 of the Railway Labor Act, also Section 5, First (b) of the Act reading "Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused", the Board has no alternative but to docket Mr. Tolleson's application of May 29, 1962 above referred. The application is, therefore, being

Defendants' Exhibit 18

given NMB Docket No. A-6766, and since Mr. Gilbert has stated his notice of September 7, 1960 should be handled concurrently, it is also being made a part of this case. Mr. Gilbert is requested to formalize this matter by submitting his application for mediation on that notice.

A mediator will be assigned to mediate both Case No. A-6754 and A-6766 within the next few days. Please acknowledge.

Very truly yours,

/s/ E. C. THOMPSON
E. C. Thompson
Executive Secretary

Defendants' Exhibit 19

MEMORANDUM

DATE: November 15, 1962

TO : H. E. Gilbert
FROM : J. W. Jennings
SUBJECT: Proposed Strike Action—Southern Railways

In dealing with this situation and keeping in mind the necessity of proceeding in this action without becoming involved with the present litigation involving Sec. 4 of the Diesel Agreement, it would appear necessary that we predicate all of our actions on violation of other Agreements in effect on the Southern System.

In all discussions of the matter with General Chairman McCollum and Attorney Kramer, it has been continually stressed that we should confine our actions to the following:

Article 25 (e)—Mileage Regulations

Section 11 (e) (f) of the 5-Day Work Week Agreement.

Those provisions of Article 25, above referred to, set forth the minimum and maximum allowable miles in freight and passenger service and contains the further stipulation that a "sufficient" number of men will be assigned to insure compliance with the rule.

Section 11 (e) (f) of the 5-Day Week Agreement as implemented in the Southern Agreement sets forth the minimum and maximum miles in yard service and again

Defendants' Exhibit 19

requires a "sufficient" number of men be assigned to insure compliance.

Paragraph (f) further points out that a specified number of men will be assigned to the various yard boards.

In addition to the foregoing violations of the Agreement upon which we may rely to institute strike action, the files contain numerous instances where officials and employees of other crafts have performed service as firemen in all classes of service on the Southern.

J. W. Jennings

/s/ J. W. J.

JWJ :mhw

Defendants' Exhibit 20

General Grievance Committee
BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN
SOUTHERN RAILWAY SYSTEM
First National Bank Building
Tuscumbia, Alabama

November 27, 1962

ALL LOCAL CHAIRMEN BLF&E—SOUTHERN
RAILWAY SYSTEM, INCLUDING CAROLINA
AND NORTHWESTERN RAILWAY AND EN-
GINEERS ON THE GEORGIA, SOUTHERN AND
FLORIDA RAILWAY

Sirs and Brothers:

This has reference to those portions of letter dated June 27, 1960 over the signature of General Chairman R. L. McCollum which was attached to and made a part of strike ballot circulated on the Southern Railway System, including Carolina & Northwestern Railway and engineers on the Georgia, Southern & Florida Railway, in connection with failure of the carrier to comply with the provisions of Article 25—Mileage Regulations and the Vacation Agreement. Vote of the General Grievance Committee was unanimous for a withdrawal from service and a strike was authorized to begin on July 26, 1960, and was postponed at the request of the National Mediation Board.

Efforts of the Board to resolve the disputes were unsuccessful and the Board relinquished jurisdiction in the case and closed its files on June 4, 1962. The following events have transpired since the Board relinquished jurisdiction of the dispute.

Defendants' Exhibit 20

On several Divisions of the Southern System, assigned vacations of some firemen have been cancelled by the carrier as late as November, 1962, irrespective of the fact that such vacations were assigned in December, 1961, in accordance with the terms of applicable agreements on the property.

That part of the dispute involving Article 25, Mileage Regulations, has resulted in some road firemen being required to work as many as 5900 miles in the month of October, 1962. During the same period, some yard firemen have been worked in excess of 40 days.

As of this date, all efforts to secure a satisfactory settlement of the disputes with the carrier have been exhausted.

In view of the unreasonable and arbitrary action taken by the carrier with respect to the issues involved, it may become necessary for a peaceful withdrawal from service by all Firemen-Helpers, Hostlers, and Outside Hostler Helpers involved, as well as Engineers on the Georgia, Southern & Florida Railway. The exact date and time for such withdrawal from service will be furnished you by telegram.

DUTIES OF STRIKE COMMITTEE

Each Local Chairman shall act as Chairman of the local Strike Committee. Arrangements should be made for halls at all terminals for meeting purposes and roll call. Expense of the halls will be borne by local lodge or lodges involved.

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During the opening meeting following the effective time of a strike a secretary will be elected. The Chairman of the Strike Committee will read the entire list of Instructions in order that all men will have an understanding of their duties and responsibilities as well as those of the officers and committeemen in charge of strike activities.

No person will be permitted to be present in the meeting halls other than those who are on strike, except by permission of the assemblage.

The Secretary will arrange a roll call (alphabetically). Roll will be called twice daily—morning and afternoon. The names of the non-members will be kept separate on the roll from the names of those who are members of the BLF&E. All strikers will be required to answer the roll call and also to be in the halls, where halls are provided, during the day at all times unless excused by the Strike Committee or by the Chairman of the meeting. **THE SECRETARY WILL KEEP A RECORD OF THE PROCEEDINGS FROM DAY TO DAY.**

Particular care must be exercised concerning the registration. No one except an Engineer, Fireman-Helper, Hostler or Outside Hostler Helper will be permitted to register. At the close of each day, each Local Chairman should forward a copy of the register to the General Chairman, at strike headquarters. (See attachment for location).

The Local Chairman will supervise the prosecution of the strike on the territory over which he has jurisdiction.

Local Chairmen in consultation with Vice Presidents and General Organizers having jurisdiction over lodges in their territories are expected to keep in close touch with

Defendants' Exhibit 20

the situation and will report daily, preferably by night telegram letter to the main strike headquarters (see attachment for location) as to the condition of affairs.

Clearly defined cases of disloyalty, indifference or inefficiency on the part of any representative of the Brotherhood should be reported to the General Chairman.

In the event of a settlement being reached, or if, for proper and sufficient reasons a postponement of the date set for leaving the service becomes advisable or necessary, the General Chairman will advise the Local Chairmen by wire to that effect. The General Chairman will also advise all Local Chairmen of the termination of a strike.

DUTIES OF MEMBERS

No man in road service involved in the strike will perform any service after the hour set to strike, unless he has already begun a trip and has actually left the terminal. If the train has left the terminal, he will complete the trip and deliver the engine and train at the end of the run, or tie-up point, if tied up under the law, after which he will perform no other service until the close of a strike except as outlined in the following paragraphs. Men in other than road service will leave the service at the appointed time.

"Complete the trip" means that when the train reaches a point which by agreement or assignment is a terminal for any member of the train or engine crew.

With respect to turnaround runs the following will govern: Men in turnaround service (passenger and freight)

Defendants' Exhibit 20

will not start work on any leg of their assignment out of a terminal after the hour set for withdrawal of men from service.

So far as your legal right to strike is concerned, there is no difference between a mail train and any other train: You have identically the same right to refuse to perform this service as on any other train. Men in road and yard service are to handle and transport troop trains, hospital trains, milk trains and cars loaded with priority materials or supplies essential to the National Missile and Defense Program designated as such by the Federal Government, with the understanding that no other commodities are to be handled in connection therewith.

All men on strike will keep away from the company's property, except such men as are designated certain duties to be performed by authority of the Strike Committee. PICKETS MUST AVOID TRESPASSING ON COMPANY PROPERTY WHILE ON PICKET DUTY.

Every man should understand that the laws of the Brotherhood must be obeyed. Acts of violence of any nature will not be tolerated.

In the conduct of a strike some irresponsible persons, not members of the Brotherhood of Locomotive Firemen and Enginemen might engage in acts of violence and disorderly conduct. Such actions are usually attributed to members of the Brotherhood of Locomotive Firemen and Enginemen, and great care should be taken by every member to avoid associating with such persons. All acts of violence and disorderly conduct should be reported to the Strike Committeemen.

Defendants' Exhibit 20

Some railroad officials may endeavor to coerce or mislead the men by asserting that men at other points have not withdrawn from the service or that they have returned to work. Such information should be disregarded, and all strikers should apply to their Strike Committeemen for such information regarding the facts and be governed accordingly. No member or non-member will return to work until he is officially instructed to do so by the Strike Committee in charge of the strike in his area.

Immediately after a strike becomes effective all men will assemble at the hall, secured in advance, for meeting purposes.

Attached hereto is Appendix "A" listing assignment of Grand Lodge Officers and/or General Organizers and the Districts under their jurisdiction.

All concerned will cooperate to the fullest extent in order that these instructions may be fully and completely complied with.

Fraternally yours,

/s/ R. L. McCOLLUM
R. L. McCollum
General Chairman

Approved: /s/ J. W. JENNINGS
J. W. Jennings, Vice President

cc: Presidents, Recording and Financial Secretaries,
of all lodges involved.

All Officers and General Organizers assigned.



ITINERARY OF GRAND LODGE OFFICERS
AND GENERAL ORGANIZERS
SOUTHERN RAILWAY DISPUTE

		<u>LODGE</u>	<u>DATE</u>
1. <u>C. H. GREER</u>	Ludlow, Kentucky	764	Tues. Dec. 4, 10 AM & 7:30 PM
	Danville, Kentucky	367	Wed. Dec. 5, 10 AM & 7:30 PM
	Louisville, Kentucky	878	Mon. Dec. 3 10AM & 7:30 PM
	Princeton, Indiana	409	Sun. Dec. 2 10 AM & 7:30 PM
	East St. Louis, Illinois.	44	Fri. Nov. 30 10 AM & 7:30 PM
2. <u>M. A. ROSS</u>	Tuscumbia, Alabama	279	Fri. Dec. 7 10 AM & 7:30 PM
	Birmingham, Alabama	426-604	Thurs. Dec. 6, 10 AM & 7:30 PM
	Selma, Alabama	633	Tues. Dec. 4, 10 AM & 7:30 PM
	Meridian, Mississippi	200	Mon. Dec. 3, 10 AM & 4:00 PM
3. <u>J. W. LOVE</u>	Chattanooga, Tennessee	289	Mon. Dec. 3, 7:30 PM
	Chattanooga, Tennessee	289	Tues. Dec. 4, 10 AM
	Knoxville, Tennessee	444	Wed. Dec. 5, 10 AM & 7:30 PM
	Appalachia, Virginia	643	Fri. Dec. 7, 10 AM & 7:30 PM
4. <u>J. M. QAZAFY</u>	Greenville, South Carolina	745	Mon. Dec. 3, 10 AM & 7:30 PM
	Columbia, South Carolina	427	Wed. Dec. 5, 10 AM & 7:30 PM
	Charleston, South Carolina	744	Fri. Dec. 7, 10 AM & 7:30 PM
5. <u>D. L. GILLILAND</u>	Asheville, North Carolina	455	Sat. Dec. 8, 10 AM & 7:30 PM
	Spencer, North Carolina	626	Wed. Dec. 5, 10 AM & 7:30 PM
	Greensboro, North Carolina	728	Thurs. Dec. 6, 10 AM & 7:30 PM
6. <u>W. E. MITCHELL</u>	Jacksonville, Florida	80	Mon. Dec. 3, 7:30 PM
	Valdosta, Georgia	842	Tues. Dec. 4, 10 AM & 7:30 PM
	Macon, Georgia	246	Thurs. Dec. 6, 10 AM & 7:30 PM
	Atlanta, Georgia	651-841	Fri. Dec. 7, 10 AM & 7:30 PM
7. <u>J. W. JENNINGS</u>	Alexandria, Virginia	625	Tues. Dec. 4, 1:30 PM & 7:30 PM
	Richmond, Virginia	473	Mon. Dec. 3, 10 AM & 7:30 PM

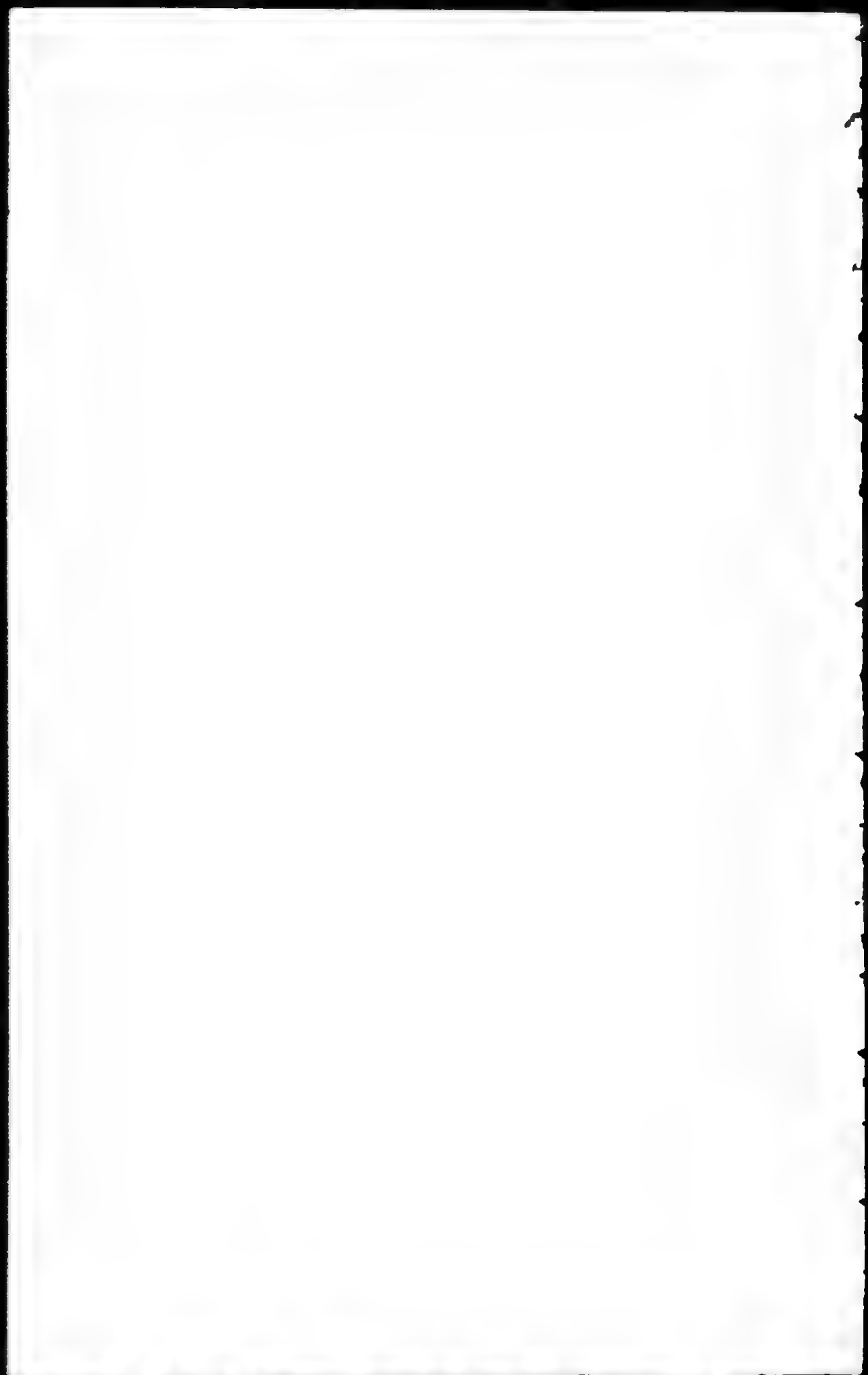
ATTACHMENT A

ASSIGNMENT AND JURISDICTION OF
VICE PRESIDENTS AND GENERAL ORGANIZERS
SOUTHERN RAILWAY DISPUTE

Strike Headquarters:
Labor Building,
Room 704,
400 - 1st Street, N. W.,
Washington, D. C. (TELEPHONE) Executive 32611
In Charge: Vice President J. W. Jennings
General Chairman R. L. McCollum

HOTEL

1. C. H. GREER Cincinnati, Ohio Metropole Hotel
Lodges: 764-367-878
409-44
2. M. A. ROSS Birmingham, Alabama Bankhead Hotel
Lodges: 279-426-604
633-200
3. A. M. LAMPLEY Knoxville, Tennessee Andrew Jackson Hotel
Lodges: 444-643
4. J. M. GAZAFY Columbia, South Carolina Holiday Inn
(West Columbia)
Lodges: 745-427-744
5. D. L. GILLILAND Salisbury, North Carolina Yadkin Hotel
Lodges: 626-728-455
6. W. E. MITCHELL Atlanta, Georgia Hotel Atlantan
Lodges: 80-842-246
651-841
7. J. W. JENNINGS Washington, D. C. Room 704
Railway Labor Bldg.
400 - 1st Street, N.W.
Washington 1, D. C.
and
Dodge House Hotel
8. J. S. LOWE Chattanooga, Tenn. Patten Hotel
Lodges: 289



Defendants' Exhibit 44

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

August 27, 1959

File 14032

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

The Washington Division has been operating for the past few months with a shortage of firemen.

This question was discussed with Superintendent T. D. Moore, Jr. by Local Chairman C. B. Swan prior to the month of July. No action was taken by Superintendent Moore to alleviate this condition and a letter was addressed to Mr. Moore July 4. At that time there were no firemen available to assign to two hostler helper assignments and had not been for some time. The extra list has been working short-handed.

We insist that sufficient firemen be made available to comply with Section 4 of the Diesel Agreement and Article 25 (e) of the Schedule. There are vacancies, this date, for six firemen for the freight extra list and the No. 46 cut-off.

A similar situation was recently reported to you from the Atlanta Division South of Macon and we hope that you will give the same consideration in this case that men may be provided to properly comply with the agreements now and in the future.

Kindly advise.

Yours very truly,

/s/ R. L. McCOLLUM
General Chairman

CC: Mr. C. B. Swan, LC 625

Defendants' Exhibit 45

(Western Union Telegraph Form)

LLA705 NSA272

NS SFA051 PD TUSCUMBIA ALA 9 33SPMC

L G TOLLESON SOUTHERN RAILWAY CO
WASHDC

RE TELEPHONED MR. FORD MARCH 9 YOUR FILE
H-291-18-58 AND REQUESTED CONFERENCE DATE
SUPERINTENDENT MUMFORD OPERATED LAW-
RENCEBURG LOCAL WITHOUT A FIREMAN
MARCH 9 WHICH ACCENTUATES NECESSITY FOR
CONFERENCE SITUATION SERIOUS AND SUFFI-
CIENTLY IMPORTANT FOR IMMEDIATE CONFER-
ENCE PLEASE ADVISE PROMPTLY IMMEDIATE
DATE THAT YOU OR STAFF MEMBER CAN MEET
US TO COMPOSE THIS MATTER

B L MCCOLLUM

[Handwritten notation—Read to Mr. T at 1:00 pm. He
will reply from Chicago. N. E., 3/10/60.]

Defendants' Exhibit 46

At Chicago—March 12, 1960. td

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Sir:

Your telegram March 10:

I understand you desire to discuss with me alleged violations of provisions of our Agreement with our firemen. I have previously pointed out that the Agreement is not being violated and that no claims or complaints have been filed by any Washington Division firemen, alleging violation of the Agreement. As to the Louisville Division, I am told there has been no claim or grievance filed by any employees, alleging violation of the Agreement.

Under the circumstances, your assertion that "situation serious and sufficiently important for immediate conference" is uncalled for and untrue. Nevertheless, as you seem to so completely lack understanding of what is involved, I am agreeable to conferring with you on some mutually convenient date, with the understanding that it is without prejudice to the fact that there are no claims or grievances properly on appeal to me, and without establishing a precedent. I am now engaged in handling other matters here, but unless something unforeseen develops I can meet with you in my office in Washington at 10:00 a.m., Thursday, March 24. Please acknowledge receipt and advise if this date is agreeable to you.

Very truly yours,

Signed—L. G. Tolleson
Director of Labor Relations.

Defendants' Exhibit 47

BEFORE

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**SOUTHERN RAILWAY COMPANY
THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY
NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY
THE NEW ORLEANS TERMINAL COMPANY
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY
ST. JOHNS RIVER TERMINAL COMPANY
CAROLINA AND NORTHWESTERN RAILWAY COMPANY**

VS.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

CARRIERS' EX PARTE SUBMISSION

Carriers' Statement of Claim:

That under their agreements with their firemen they have no contractual obligation to hire new firemen.

Carriers' Statement of Facts:

On January 1, 1959 all Petitioners but the Carolina and Northwestern Railway Company entered into a collective bargaining agreement with their firemen, hostlers and outside hostler helpers as represented by the Brotherhood of Locomotive Firemen and Enginemen. On April 22, 1960,

Defendants' Exhibit 47

after negotiations between the parties, Article 26(g) of that agreement captioned "Seniority on Two Seniority Districts," was revised. A copy of that memorandum agreement is attached hereto as Carriers' Exhibit "A".

Contractual Provisions

On May 17, 1950, all Petitioners but the Carolina and Northwestern Railway Company entered into a mediation agreement pertaining to the employment of firemen on diesel locomotives. This agreement, copy of which is attached as Carriers' Exhibit "B", incorporated into the current collective bargaining agreement in part provides:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; provided that the term 'locomotives' does not include any of the following * * *." (Section 4)

* * *

"Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement or of the agreements identified in Section 1 hereof, may be referred by either the carrier or representatives of the employees concerned to a committee, the carrier members of which shall be members of the Carriers' Conference Committees signatories hereto or their successors or representatives; and the Brotherhood members of which shall be the International President, or his representative, together with nine General Chairmen selected by the Brotherhood. Interpretation or application agreed upon by such committee shall be final and binding upon the parties to such dispute or controversy.

"This provision is not intended to prohibit the parties from filing claims with the National Railroad Ad-

Defendants' Exhibit 47

justment Board in the manner provided in the Railway Labor Act as amended, but if the committee provided for herein agrees upon an interpretation or application of the affected provisions of the agreement, such claims shall be withdrawn and settled in accordance with the decision of the committee.

Note: This provision does not supersede the provisions of the two Arbitration Agreements executed this date." (Section 7)

Section 4 of this "Diesel Agreement" (Carriers' Exhibit "B") is the same as Section 3 of an agreement dated January 10, 1946, between the Carolina and Northwestern Railway Company and its firemen as represented by the Brotherhood.

Until April 22, 1960, Article 26(g) of the collective bargaining agreement provided:

"When a fireman holds seniority as such on two seniority districts and stands for a regular position as fireman or for service on the extra board as fireman on both seniority districts at the same time, he shall be required to elect, within thirty days of date he first stands for such regular position or extra board service, the seniority district on which he desires to remain and shall forfeit his seniority on the other district."

On April 22, 1960, Article 26(g) was revised to provide:

"A fireman cut off on his home seniority district who accepts employment on another seniority district (road or yard) or any of the railroads parties hereto will establish seniority under the rules as a new man on such second seniority district. He will notify the officer in charge of his home seniority district that he

Defendants' Exhibit 47

is accepting employment on another seniority district, identifying such district. After establishing seniority on a second seniority district, he will be subject to and governed by all the rules in the Agreement in the same manner as all other employees holding seniority on such district, and:

(1) He will not forfeit seniority on his home seniority district because of standing for service there while simultaneously standing for service on the second seniority district;

(2) He must keep his address on file with the officer in charge of his home seniority district; he will be notified when he stands for service on his home seniority district but will not be required to protect service there while working on his second seniority district unless he elects within thirty (30) days to return to his home seniority district, in which case he will give appropriate notice to the officers in charge of both seniority districts;

(3) However, he may at any time, by giving six (6) days' advance notice in writing to the officers in charge of both seniority districts, displace a junior man on a regular assignment on his home seniority district;

(4) If he elects to return to his home seniority district as permitted in (2) or (3) above, a fireman will not forfeit his seniority on his second seniority district, but can thereafter exercise seniority on his second seniority district only when cut off on his home seniority district;

(5) If cut off on both seniority districts, he will be subject to recall on both. If recalled to service on his

Defendants' Exhibit 47

home seniority district, he will not forfeit seniority on his second seniority district but will thereafter not be permitted to exercise seniority on his second seniority district unless and until he is again cut off on his home seniority district;

(6) The foregoing provisions will be applicable to all firemen who now hold seniority as such on more than one seniority district."

Employment of Firemen—A Brief Summary

The Southern Railway System for collective bargaining purposes is divided into fifty seniority districts for firemen. Many of these districts were established in the days of steam motive power and their size was determined by the operating limits of the steam engine, obviously far smaller than those of the diesel locomotive. Nevertheless, these districts, because of the requirements of collective bargaining agreements, have been continued in existence to the present day even though all motive power on the system has been dieselized.

Under the collective bargaining agreement, every individual fireman has a home seniority district. That district is usually the one in which a particular fireman first entered the service. Depending on his length of service in his home district, a fireman may (1) have a regular assignment as such, (2) be on the extra board, filling vacancies on regular jobs or performing extra work or (3) be cut off, i.e., on furloughed status.

Prior to April 22, 1960, a fireman furloughed in his home seniority district and given employment in another district had to elect within thirty days which of the two seniority districts he desired to continue to work in if later he stood

Defendants' Exhibit 47

for service in both districts. By this election, he forfeited his seniority in the other district. Because of the thirty-day election-forfeiture provision, few firemen were willing to accept service outside of their home districts.

*The Revision of Article 26(g)—
Events Which Took Place Between
July 1959 and April 22, 1960*

On August 27, 1959, R. L. McCollum, the Brotherhood's General Chairman on our lines wrote to Mr. L. G. Tolleson (then Director of Labor Relations for each of the Petitioners and since July 1, 1961, Assistant Vice President of Labor Relations of each of the Petitioners), complaining of a "shortage of firemen" during the prior "few months" on the Washington Division and complaining of a "similar situation on the Atlanta Division South." He insisted

"that sufficient firemen be made available to comply with Section 4 of the Diesel Agreement and Article 25 (e) of the Schedule."

Carriers' Director of Labor Relations investigated this complaint and wrote to General Chairman McCollum on December 4, 1959, that the factual situation was the following:

"In reviewing the manpower situation earlier this year, Superintendent Moore found that too many men had been assigned to take their vacations in the months of June, July, and August, and that this would bring about a temporary need for several additional firemen. He therefore served notice on a total of twenty-six cut-off firemen, in accordance with the rule in the Agreement, to report for service within thirty days.

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Only nine reported. The balance, seventeen, refused or failed to report and have since forfeited their seniority. Thus, it is clear that it was because of the failure or refusal of men represented by your Organization to report for work that there was a temporary shortage of firemen and, as a result, some men slightly overran their mileage in June, July, and August. None of the employees filed complaint; in fact, I understand they were glad to get the extra work and earn the extra money. Under the circumstances, there obviously was no basis for complaint by your Organization."

In the process of this investigation Carriers' Director of Labor Relations found that there were ninety-seven cut-off firemen on the Danville Division which connects with the Washington Division and, therefore, proposed that if and when additional firemen were needed on the Washington Division, they be taken from the Danville Division, saying in that same letter:

"In my opinion, if and when additional men are needed on the Washington Division, the proper and, obviously, the fairest thing to do is to give preference to the cut-off men on the Danville Division. It would be unthinkable to go out on the street and hire men to work on the Washington Division when there are numerous cut-off men on the Danville Division. As these Danville Division cut-off firemen are represented by your Organization, surely you will agree with this. I therefore propose that we enter into an agreement providing for a top and bottom consolidation of seniority rosters of firemen on the Washington and Danville Divisions, so that these cut-off men on the Danville Division will be given an opportunity to work on the

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Washington Division as well as on the Danville Division."

On December 5, 1959, General Chairman McCollum wired Director of Labor Relations Tolleson that he was going to consider his proposal and "advise".

On January 12, 1960, Director of Labor Relations Tolleson received a letter from General Chairman McCollum replying to his suggested solution for the purported shortage of firemen on the Washington Division. He stated in pertinent part:

"As advised in my telegram December 5, this matter has been given consideration. There would be several complications involved—the main one being the standing of these firemen when they were called for service as engineer or promoted to service as engineer. We can settle this matter without the necessity of raising these questions and becoming involved in disputes relative to seniority by applying Article 26 (g) of the current firemen's agreement,"

. . . .

"Article 26 (g) provides that Danville Division firemen may be employed on the Washington Division and they will have 30 days to elect which division they care to retain their seniority on, after standing for both working lists. In the event the firemen that are furloughed on the Danville Division do not desire to be employed on the Washington Division, they would not report for the Washington Division even should we consolidate the lists. It would certainly be unfair to any Danville Division fireman to take his Danville Division seniority simply because he did not desire to work on

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the Washington Division. For reasons herein stated, we do not care to enter into a proposed top and bottom consolidated seniority list of the Danville and Washington Division firemen at the present time."

On March 24 and 25, 1960, Director of Labor Relations Tolleson met with General Chairman McCollum and W. E. Mitchell, Vice President of the Brotherhood. Also present was Julian M. Ford, Petitioners' Assistant Director of Labor Relations. At this meeting, Director of Labor Relations Tolleson made it clear that Petitioners had no obligation under Section 4 of the Diesel agreement to hire "new firemen," and that their obligation was limited, as Section 4 expressly provides, to the use of firemen or helpers currently in the "seniority ranks of the firemen." As a result of these meetings, Article 26 (g) of the contract was revised so that a fireman could stand for service outside of his home district without being forced to elect between the two districts. The revision became effective April 22, 1960. (Carriers' Exhibit "A")

This agreement should have ended the dispute. There were hundreds of furloughed firemen throughout the System who were enabled by the revision to obtain employment in other districts without loss of seniority in their home seniority district. All parties to our March 24-25, 1960, conferences knew this and recognized that there could not be a "shortage" of firemen as long as there were so many furloughed firemen in the seniority ranks of the firemen's organization.

Events After April 22, 1960

On May 5, 1960, Petitioners moved to implement the April 22, 1960 agreement, to put as many of our furloughed

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firemen to work as possible. On that day, Director of Labor Relations Tolleson sent the following letter to all furloughed firemen:

"There recently developed a need for firemen on certain seniority districts. Where firemen are needed the Company desires to give preference to cut off firemen, and has entered into an agreement with the Brotherhood of Locomotive Firemen and Enginemen whereby a fireman (road or yard) cut off on one seniority district who accepts employment on another seniority district (either road or yard) will not lose his seniority at home. Copy of the agreement is enclosed for your information.

"I am informed that firemen are now or soon will be needed on:

Washington Divn.—road,
yard.

Richmond Divn. — yard
(North and South Ends).

Charlotte Divn. — yard
(North End).

Columbia Divn.—yard.

Charleston Divn. — road.

Atlanta Divn. — road
(North End); road,
yard (South of Macon)

GS&F—road.

St.JR—yard.

Asheville Divn.—yard.

Louisville Divn.—road.

Mobile Divn.—road, yard.

Chattanooga Term. —yard.

CNO&TP (1st Dist.)—yard.

"Please fill out and sign the enclosed card, mailing it to me to show whether you are interested in working on the above seniority districts, indicating your preference.

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"If you are interested in working on any seniority district other than listed above, please so indicate on the enclosed card."

Copies of this letter were supplied to Messrs. Mitchell and McCollum on May 13, 1960.

On July 11, 1960, after this letter had been dispatched, there were still hundreds of firemen on furlough status. Because of the refusal of furloughed firemen to accept employment in other than their home districts, there remained a few districts in which because of absences, sickness, failures to double through and the like, a few trains had to be run and yard engines worked without firemen. Petitioners consistently took the position with the Brotherhood, that as long as hundreds of furloughed firemen had the opportunity to work without prejudice to their seniority rights but refused to do so, Petitioners were not required by contract either to hire new firemen or to annul the runs affected. Petitioners also took the position with the Brotherhood, that in any event, Section 4 of the Diesel Agreement did not require the employment of new firemen not currently in the seniority ranks of the Brotherhood.

Nevertheless on July 11, 1960, Director of Labor Relations Tolleson received the following telegram from Vice President Mitchell:

"REFERENCE DISPUTE BETWEEN OUR GENERAL GRIEVANCE COMMITTEE AND SOUTHERN RAILWAY MANAGEMENT INVOLVING REFUSAL OF CARRIER TO HIRE SUFFICIENT FIREMEN TO PROTECT NEEDS OF SERVICE IN ORDER TO ADMINISTER AND PERPETUATE BLF&E CONTRACTS ON THIS PROPERTY. YOUR REFUSAL TO HIRE FIREMEN SERI-

Defendants' Exhibit 47

OUSLY DEPLETES AND IN TIME WILL ARBITRARILY ELIMINATE THE FIREMENS CRAFT ACCORDINGLY THE GENERAL GRIEVANCE COMMITTEE HAS VOTED TO SET A STRIKE OF EMPLOYES REPRESENTED BY THE BLF&E IN FURTHER PROSECUTCNG THIS DISPUTE WHICH ACTION HAS BEEN APPROVED BY OUR PRESIDENT H E GILBERT HOWEVER BEFORE PROCEEDING FURTHER I SUGGEST ANOTHER IMMEDIATE CONFERENCE WITH YOU IN A FINAL EFFORT TO PEACEBLY RESOLVE THIS DISPUTE. IF YOU ARE AGREEABLE TO THIS PROCEDURE PLEASE CONTACT MCCOLLUM WHO WILL BE IN WASHINGTON FOR JULY 13 CONFERENCE WITH MR. FORD AND HE WILL SO ADVISE ME OF CONFERENCE DATE SET."

On July 13, 1960, Director of Labor Relations Tolleson replied to Vice President Mitchell as follows:

"Your Western Union night letter of the 11th about hiring firemen is indeed surprising. Moreover, it is disappointing to me because you have evidently overlooked the agreement recently negotiated with you.

"I remind you that when I conferred with you and General Chairman McCollum on March 24-25, 1960, about complaints Mr. McCollum himself had filed with me concerning alleged violation of certain rules of the Firemen's Agreement, I called attention to the fact that there was a total of about 739 firemen cut off Southern Railway System Lines. I then explained that the Company feels that if and when additional men are needed on a particular seniority district, the proper and, obviously, fairest thing to do is to take men cut

Defendants' Exhibit 47

off on other seniority districts, thus giving them employment. You agreed. We then discussed and tentatively agreed upon specific rules under which a man cut off on his home seniority district who is hired on another seniority district may retain his seniority on his home district. You asked that I prepare and send the agreement to Mr. McCollum, saying that under the bylaws of your Organization it would be necessary, before he executed it, to obtain approval of the Local Chairmen. The following day I sent Mr. McCollum draft agreement for his signature and furnished you copy of it. On April 5, Mr. McCollum returned the agreement which he had executed. Under its terms, it became effective April 22, 1960.

"Since that time, I have written a letter to each cut off fireman, sending copy of the agreement and advising him that there was need for firemen on thirteen seniority districts. With that letter I enclosed a self-addressed, stamped postal card, which I asked be filled out and mailed to me by the cut off fireman indicating his first, second and third choice. You will recall that when you and Mr. McCollum were recently here, I furnished each of you copy of my letter to cut off firemen and explained what had been done. Our records now show that the need for firemen has been filled on practically all seniority districts listed in my letter to the cut off firemen. We are communicating with other cut off firemen for the purpose of giving them employment on seniority districts where there is need for additional firemen, and will continue to do so. There can be no dispute with your Organization. To the contrary, your Organization has agreed with the Company that where there is need for firemen on a particular

Defendants' Exhibit 47

seniority district, such need shall be filled by using firemen cut off on other seniority districts. We are complying with the provisions of the agreement.

"Under the circumstances, I do not understand why the General Grievance Committee has voted to set a strike and why a conference is desired. However, I am agreeable to discussing the matter with you at 10:00 A.M., Tuesday, July 19."

On July 19, 1960, Director of Labor Relations Tolleson met with Messrs. Mitchell and McCollum to discuss their conflicting interpretations of Article 26(g) and its effect upon Section 4 of the Diesel Agreement. The Brotherhood's representatives adhered to their position that under the Diesel Agreement Petitioners had to hire new firemen or annul affected runs even though there were hundreds of firemen on furlough. Director of Labor Relations Tolleson disagreed completely with their position. He maintained that under Article 26(g) all that is required is that Petitioners make work available to furloughed individuals in the seniority ranks of the firemen's organization. This Petitioners had done on May 5, 1960 and 38 furloughed firemen had been given employment by July 19, 1960, with additional ones to be reemployed as time went by. Director of Labor Relations Tolleson further maintained that Petitioners were under no obligation to hire new employees, since their obligation was limited to the use of firemen actually holding seniority in the ranks of the firemen.

Nevertheless, on July 21, 1960, Director of Labor Relations Tolleson received the following telegram from E. C. Thompson, Executive Secretary of the National Mediation Board:

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"FOLLOWING WIRE RECEIVED FROM PRESIDENT GILBERT OF BLF&E 'BLF&E HAS AUTHORIZED STRIKE BY EMPLOYEES REPRESENTED ON SOUTHERN RAILWAY FOR 6AM TUESDAY MORNING JULY 26, 1960 ACCOUNT CARRIER REFUSING TO HIRE FIREMEN IN ORDER THAT DIESEL AGREEMENT REQUIRING EMPLOYMENT OF DIESELS CAN BE FILLED.' PLEASE WIRE STATEMENT."

On July 22, 1960, Petitioners pointed out to the Board by telegram that the threatened strike, which involved a "minor" dispute under the Railway Labor Act, was illegal. Nevertheless, in this telegram Petitioners invoked the services of the Board because of the emergency the Brotherhood had created, saying:

"Your wire 21st quoting one from President Gilbert of BLF&E, saying he has authorized strike for 6:00 A.M., Tuesday, July 26, 1960, account Carrier refusing to hire firemen in order that Diesel Agreement requiring employment of firemen on Diesels can be fulfilled. Mr. Gilbert's charge is unfounded. As evidence of this, I am sending you, by mail, copy of Director of Labor Relations Tolleson's letter of July 13th to Vice President Mitchell, BLF&E, and copy of the Agreement referred to therein. Matter discussed in conference Mr. Mitchell and the General Chairman on July 19th at which was pointed out have already given employment to some thirty-eight cut off firemen and other cut off firemen will be given employment to fill need for firemen on all seniority districts in due time, in conformity with recent agreement. Threat of strike is not only unconscionable, but illegal. Under circum-

Defendants' Exhibit 47

stances, Carrier hereby invokes services of Mediation Board to afford it an opportunity to bring the facts to light."

On that same day the Board proffered its services under Section 5(B) of the Act which covers any "labor emergency". The Board also requested the Brotherhood to postpone its strike threat. On or about July 25, 1960, the Brotherhood complied.

During the week of July 24-30, 1960, Petitioners personally contacted one hundred and seventy-one firemen on furloughed status on the Danville, Knoxville, Memphis and Birmingham Divisions of the Southern Railway Company and on The Alabama Great Southern, the New Orleans and Northeastern and The New Orleans Terminal Company lines. This resulted in Petitioners giving employment to seventeen additional furloughed firemen. (Thirty-eight others had previously been given employment in response to the Director of Labor Relations' letter of May 5, 1960.) In addition, 21 furloughed firemen applied directly on the local level and were given employment on another seniority district. In all, Petitioners' program under Article 26(g) as revised, resulted in 76 furloughed firemen being returned to gainful employment by August 1, 1960. The result of Petitioners' personal contact survey of July 24-30, 1960 is attached hereto as Exhibit "C".

On August 9, 1960, Director of Labor Relations Tolleson received a complaint concerning a "shortage" of firemen at Macon. He found that this situation had already been rectified by giving employment at Macon to firemen on furlough status from other seniority districts. Thus on August 18, 1960, he wrote General Chairman McCollum in part as follows:

Defendants' Exhibit 47

"I assume you have been advised by your local Chairman that as soon as it was known that there was need for additional firemen on this seniority district, employment was given to cut off firemen from other seniority districts, as I told you we would do, in accordance with our agreement, and that there is no shortage of firemen on the south end of the Atlanta Division."

On November 15, 1960, Director of Labor Relations Tolleson received the following telegram from the National Mediation Board:

"FOLLOWING WIRE RECEIVED FROM GENERAL CHAIRMAN MCCOLLUM BLF&E 'YOU WIRED H E GILBERT JULY 22, 1960 ADVISING NMB PROFERRED SERVICE IN CASE E-240 REQUESTING ORGANIZATION POSTPONED JULY 26 STRIKE DATE. SOUTHERN RAILWAY MANAGEMENT CONTINUES VIOLATIONS OF AGREEMENT THREE RECENT CASES NOV 4 FIREMAN NOT USED 11 PM JOB CHARLESTON SOUTH CAROLINA: NOV 11 FIREMAN NOT USED 11 PM JOB CHARLESTON SOUTH CAROLINA: NOV 15 11 PM JOB WORKED 2 HOURS AND 30 MINUTES WITHOUT FIREMAN UNLESS NMB CAN PREVAIL UPON SOUTHERN TO RECOGNIZE STATUS QUO WHILE MEDIATION BOARD HAS JURISDICTION THEN ORGANIZATION WILL BE COMPELLED TO SEEK OTHER MEANS FOR SETTLEMENT. KINDLY ADVISE.' YOUR PROMPT COMMENT REQUESTED."

Defendants' Exhibit 47

Petitioners investigated this situation and received a report from the superintendent on the spot. This report is annexed hereto as Exhibit "D". It indicated how complex and contingent were the scheduling difficulties which gave rise to General Chairman McCollum's complaint. On the basis of investigation, Petitioners replied to the Board on November 17, 1960, as follows:

"Reurtel November 15 quoting one from General Chairman McCollum BLF&E. Investigation develops incidents November 4 and 11 (correct date 10) cited by him caused by his own local chairman though available declining to work two shifts during a twenty-four hour period. In case November 15 man had to be relieved to comply with Hours Service Law, balance of crew working overtime. This has happened in cases of other classes employees as well as firemen from time to time for years. There was no actual shortage of men but several had marked off sick on short notice. Under circumstances complaint of Organization unconscionable."

Mediations sessions were held on November 23, 1960. Petitioners were represented by Assistant Director of Labor Relations J. M. Ford, and A. H. Sawyer, Chief Time Inspector, and at times also by J. A. Dienelt, Personnel Assistant. These sessions included a discussion of the interpretation and application of Article 26 (g) of the main agreement and Section 4 of the Diesel Agreement.

On November 29, 1960, Petitioners were informed by the Board that mediation conferences had been recessed "based on the request of the organization." More than a year passed before the mediation sessions were resumed.

Defendants' Exhibit 47

When notified by the National Mediation Board on December 7, 1961 of the resumption of mediation, Petitioners agreed to participate, but by wire the same day reminded the Board

"that as brought out in prior conference with Mediator, issue is a minor dispute involving charge of BLF&E of specific instances of violation certain rules, therefore referable First Division, National Railroad Adjustment Board. Nevertheless, have no objection discussing further with Mediator, but prior commitments prevent my doing so or delegating anyone confer prior to December 15. Please advise if that date suitable."

A mediation session was scheduled for and held on December 15, 1961.

At this meeting, Assistant Vice President Labor Relations Tolleson discussed, among other things, the differing views concerning the interpretation and application of Article 26(g) and Section 4 of the Diesel Agreement.

On December 18, 1961, mediation sessions were again recessed by agreement of the parties and were not resumed again until May of 1962. The next session was held with the mediator alone on May 29, 1962. Before participating Assistant Vice President Labor Relations Tolleson again reminded the Board that the subject involved concerned a "minor" dispute. This meeting involved discussion of substantially the same matters as were taken up on December 15, 1961.

At 11:05 A.M. on May 31, 1962, Assistant Vice President Labor Relations Tolleson received a phone call from Mediator Roadley who had been assigned to the case by the Mediation Board. He stated he had recommended to the Board that it withdraw because the parties agreed

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that the disputes had arisen over alleged violations of the contract and as "minor" disputes belonged before the National Railroad Adjustment Board. He assumed the Mediation Board would follow his recommendation and told Assistant Vice President Labor Relations Tolleson that he had also notified Messrs. McCollum and Jennings of his conclusion.

On June 4, 1962, the National Mediation Board closed its file. Before closing its file, the Board did not proffer arbitration to the parties.

By letter dated June 1, 1962, General Chairman McCollum again charged that defendants had violated Section 4 of the Diesel Agreement on three different dates. On June 9, 1962, Assistant Vice President Labor Relations Tolleson replied in part as follows:

"With respect to the Diesel Agreement, I remind you that in the Agreement we entered into in April 1960, your Organization agreed with me that where there is need for firemen on a particular seniority district, such need shall be filled by using firemen cut off on other seniority districts. We are complying with the provisions of that Agreement. We have given employment to many of our furloughed firemen, and you may rest assured that we will continue giving employment to our furloughed firemen to the extent they are needed and are available."

In all discussions with Brotherhood representatives, Petitioners consistently maintained that the revision of Article 26(g) had resolved the basic dispute. Petitioners also maintained that in no event did Petitioners have any contractual obligation to use firemen except for those employees actually holding seniority in the ranks of firemen.

*Defendants' Exhibit 47**Carriers' Position:*

Attention is called to the fact that the rule, the interpretation of which is the dispute before this Board, reads the same in all agreements. It is hereinafter quoted again for ready reference:

*"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; * * *"*

This rule has no application to anyone not in "the seniority ranks of the firemen." It cannot apply to a person who is not an employee. The Railway Labor Act defines an employee in Section 1 Fifth, as follows:

*"The term 'employee' as used herein includes every person in service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders. * * *"*

Thus it is clear that a man who has never been employed as a fireman by any of the Petitioners cannot be considered a man "taken from the seniority ranks of the firemen." The agreements are between these Petitioners and their firemen represented by the Brotherhood of Locomotive Firemen and Enginemen. The Brotherhood would be precluded by law from demanding that a carrier negotiate

Defendants' Exhibit 47

an agreement on behalf of people who are not employees. It is significant that the rule provides "that a fireman, or a helper, taken from the seniority ranks of the firemen . . ."

These Petitioners did not assume any obligation to people who were not and are not their employees, or to people not yet born, as the Brotherhood, in effect has contended.

It must be recognized that if subsequent to the adoption of this rule, the Petitioners, for reasons of their own, have considered it advisable to hire additional people as firemen, as was done by them after adoption of the 5-day work week for yard firemen in order to avoid penalty payments that would have resulted from having to work men in the seniority ranks of firemen more than five days a week, this does not mean that the Petitioners thought it was required of them by the rule to hire new men as firemen. Petitioners have no obligation under the rule to hire new men. Petitioners' obligation is only to those men "in the seniority ranks of the firemen."

The Brotherhood recognized and conceded there was no obligation to other than men in the seniority ranks of the firemen when it entered into an agreement dated April 22, 1960 hereinabove quoted, to afford an opportunity to obtain work on another seniority district to men furloughed on their home seniority district, without running the risk of forfeiting seniority.

The Brotherhood, in insisting that these Petitioners hire new men as firemen, are attempting to bargain for people who are not employees—this they cannot do under the provisions of the Railway Labor Act. They are precluded from bargaining for other than people who are employees within the meaning of the Railway Labor Act and in the seniority ranks of the firemen.

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For the reasons stated, Petitioners respectfully request this Board to hold:

"That under their agreements with their firemen they have no contractual obligation to hire new firemen."

All data contained in Petitioners' submission are known to the Brotherhood and are a part of this dispute.

Oral hearing is waived unless requested by the Brotherhood.

Respectfully submitted,

/s/ L. G. TOLLESON
*Assistant Vice President,
Labor Relations.*

SOUTHERN RAILWAY COMPANY,
THE CINCINNATI, NEW ORLEANS AND TEXAS
PACIFIC RAILWAY COMPANY,
THE ALABAMA GREAT SOUTHERN RAILROAD
COMPANY,
NEW ORLEANS AND NORTHEASTERN RAIL-
ROAD COMPANY,
THE NEW ORLEANS TERMINAL COMPANY,
GEORGIA SOUTHERN AND FLORIDA RAILWAY
COMPANY,
ST. JOHN'S RIVER TERMINAL COMPANY,
CAROLINA AND NORTHWESTERN RAILWAY
COMPANY.

**EXHIBIT C ANNEXED TO
DEFENDANTS' EXHIBIT 47**

	Dan- ville	Knox- ville	Memphis	B'ham	AGS	NO&NE- NOT
LISTED	56	48	47	54	45	56
Contacted	38	24	25	29	27	28
Accepted Offer and Placed (*)	2	3	0	6	0	2
Declined	36	21	25	23	27	26
Not Contacted:						
Unable to Locate	14	16	16	19	15	20
Deceased	1	1	1	3	1	1
Working other divns. or districts	0	3	2	2	2	4
Physically disabled	1	0	0	0	0	1
Recalled on home divn.	0	4	1	0	0	2
Resigned	0	0	1	0	0	0
Military Service	0	0	1	0	0	0
Undesirable	2	0	0	1	0	0

(*) Additionally, one fireman cut off NO&NE, one Knoxville Division, one Atlanta Division North and one CNO&TP First District applied direct and were placed on other districts.

TOTAL PLACED—17.

EXHIBIT D ANNEXED TO DEFENDANTS'
EXHIBIT 47

Nov. 16, 1960.

MR. TOLLESON:

Following report telephoned by Supt. Kaylor regarding Charleston situation:

There are four yard assignments at Charleston—

- (1) 7 AM - 3 PM — 7 days a week
- (2) 3 PM - 11 PM — 6 days a week
- (3) 3 PM - 11 PM — 6 days a week
- (4) 11 PM - 7 AM — 6 days a week

Firemen regularly assigned—(1) Elmore (2) Crapps (3) McFadden (4) Winn.

Regular relief assignment held by Johnson (Local Chairman) works as follows: Friday 11 PM—Saturday 3 PM—Sunday 3 PM—Monday 7 AM Tuesday 7 AM. Off days Wednesday and Thursday.

On Friday, November 4, 1960, account regularly assigned fireman (Crapps) being off sick (since November 2) vacancy existed on run No. 2—3 PM—11 PM. No extra board fireman available.

Johnson (Local Chairman) holding regular relief assignment referred to above, which included run No. 4 that date (11PM—7AM) was called and used on Run No. 2 (3PM—11PM). Refused to work his regular relief assignment (No. 4) stating he did not want to double. Attempt was made to contact cut-off yard fireman Paul (who had been working in emergency) for the 11PM job but he could not be located. Attempt was also made to contact the regularly assigned

Exhibit D Annexed to Defendants' Exhibit 47

yard fireman (Winn) who was on vacation but he was out of city.

Fireman Elmore assigned to run No. 1 (7AM—3PM) was not relieved until 3:50PM that date, therefore had not been off 8 hours at 11PM and was not considered.

Fireman McFadden on run No. 3 (3PM—11PM) was still on duty at 11PM and worked until 1:40AM November 5 and therefore could not be used.

No road firemen available account working or rest not up.

In circumstances, all efforts to get a fireman for the 11PM job were exhausted and Superintendent directed the engine be worked without a fireman.

The blanking of the firemen's job on this job could have been avoided had Yard Firemen's Local Chairman Johnson been willing to double through which he could have done without violation of Hours of Service Law.

November 10, 1960—(November 11 date referred to in Organization's telegram in error, according to Mr. Kaylor).

Same assignments as in effect on November 4.

Engineer Pierce on run No. 2 (3PM—11PM) marked off sick with flu. Johnson (Local Chairman) called and used as engineer.

Regular assigned fireman (Crapps) on same run still off account illness and Elmore, fireman on run No. 1 (7AM—3PM) doubled thru as fireman on run No. 2. Elmore marked off sick with flu upon completion of tour of duty on run No. 2.

Account Engineer Behling on run No. 4 (11PM—7AM) marking off sick with flu, vacancy existed for engineer on that run. Johnson was available (having worked run No. 2 as engineer as indicated above 3PM—11PM), but refused to double.

Exhibit D Annexed to Defendants' Exhibit 47

Emergency fireman-engineer Paul called and used as engineer on Run No. 4. McFadden was still on duty at 11PM on run No. 3 (3PM—11PM) and was not relieved until 3:25AM November 11.

Attempt was made to contact regular assigned fireman Winn who was on vacation but he was still out of town.

There was no other fireman available, either yard or road. As a consequence, it was necessary to work the 11PM run (No. 4) without a fireman.

If Johnson had doubled through as engineer on run No. 4, Paul would have been used as fireman on that run.

November 14-15, 1960 (Organization referred to November 15)

Engineers Pierce and Behling still off sick with flu. Also Crapps.

Paul, who had been put on extra board November 14, worked 3PM—11PM assignment No. 2 (Crapps' vacancy) as fireman and account no other fireman available was doubled through as fireman on run No. 4 (Winn's vacancy). Account necessity working run No. 4 beyond 7AM in order to get the work done, it was necessary to relieve Paul at 6:55AM November 15 account Hours of Service Law. No other fireman available, either road or yard, and job was worked 6:55AM to 9:30AM (2'35) without a fireman. Johnson was working run No. 4 as engineer, Behling's vacancy.

Supt. Kaylor explained that normally the yard fireman's extra board calls for only one man except that additional men are added under the agreement when a fireman goes on vacation. Anticipating Fireman Winn's vacation scheduled for November 1, cut-off fireman Toler was notified October 5 he would stand for the extra board November 1. Toler went to see Mr. Kaylor shortly before the 30 day period

Exhibit D Annexed to Defendants' Exhibit 47

was up stating that on account serious illness of his wife, he would be unable to report for duty and asked for a leave of absence. Kaylor declined but as an accommodation told him if it would be agreeable with the younger men he, Kaylor, would not insist on his returning at that time under the circumstances. Toler told him he had already done that and the men were agreeable. Consequently, Kaylor agreed for Toler not to report.

Kaylor added that one of his extra yard firemen had been off account operation for ulcers and that while effort had been made to get this man to return to work, he stated his doctor had not released him at the time there was desperate need for fireman on November 4 and 10. Keller did, however, report on the afternoon of November 15.

He now has two men on the extra board (Paul and Keller) which is all the board calls for. He has three yard firemen presently cut off who do not stand for the extra board at present time and they are not available for emergency work. In the circumstances, he says, he has not made request of us for additional firemen. (I told him if these men were around Charleston, he should get in touch with them and see if they would not be willing to work in emergency when the need arises. He said he would do so.)

Kaylor has recently employed as road firemen three men cut off on other territories, i.e., 2 from Columbia Division and 1 from Charlotte Division and they are all working. He states, however, as best he can estimate, he could give employment to one or two additional road firemen.* (I told him I would go over our list and have several cut off men on other territories get in touch with him so he could explain what the prospects are for work. Also told him to consider using these men both as road and yard firemen.)

- * Two of his older road engineers are off sick and indications are they will not return.

Defendants' Exhibit 48

At Chicago

December 4, 1959. td

H-291-18-59

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Sir:

Yours of November 3, file 14032, concerning one you wrote me on August 27, with respect to firemen on the Washington Division:

I should have written you, giving the result of my investigation, and I apologize for not doing so. Frankly, however, as I found that the situation was quite different than you had indicated, I thought you had long since learned the facts and didn't really expect an answer.

In reviewing the manpower situation earlier this year, Superintendent Moore found that too many men had been assigned to take their vacations in the months of June, July, and August, and that this would bring about a temporary need for several additional firemen. He therefore served notice on a total of twenty-six cut-off firemen, in accordance with the rule in the Agreement, to report for service within thirty days. Only nine reported. The balance, seventeen, refused or failed to report and have since forfeited their seniority. Thus, it is clear that it was because of the failure or refusal of men represented by your Organization to report for work that there was a temporary shortage of firemen and, as a result, some men slightly overran their mileage in June, July, and August. None of the employees filed complaint; in fact, I understand they were glad to get the extra work and earn the

Defendants' Exhibit 48

extra money. Under the circumstances, there obviously was no basis for complaint by your Organization.

All firemen's jobs are filled, and there are men on the firemen's extra boards.

For your further information, I find there are ninety-seven cut-off firemen on the Danville Division, which, as you know, connects with the Washington Division. In my opinion, if and when additional men are needed on the Washington Division, the proper and, obviously, the fairest thing to do is to give preference to the cut-off men on the Danville Division. It would be unthinkable to go out on the street and hire men to work on the Washington Division when there are numerous cut-off men on the Danville Division. As these Danville Division cut-off firemen are represented by your Organization, surely you will agree with this. I therefore propose that we enter into an agreement providing for a top and bottom consolidation of seniority rosters of firemen on the Washington and Danville Divisions, so that these cut-off men on the Danville Division will be given an opportunity to work on the Washington Division as well as on the Danville Division.

Please advise if you are agreeable, and I will prepare draft agreement to cover.

Very truly yours,

Signed—L. G. TOLLESON
Director of Labor Relations.

Copy—

Mr. H. E. Gilbert, President,
Brotherhood of Locomotive Firemen and Enginemen,
318 Keith Building,
Cleveland 15, Ohio.

As Information.

L G T

Defendants' Exhibit 49

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

August 18, 1961
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

We have called your attention to several instances where the working list is short and where Superintendents are violating Article 25 (e), Vacation Agreement and Section 4 of the Diesel Agreement.

The firemen's extra board at Coapman on the St. Louis Division calls for two men for mileage for the month of August. One fireman should have been added to the extra list August 16, account regularly assigned firemen starting vacation. This will require three extra men for the period August 16 through 31. There is only one man on the firemen's extra list and the roster is exhausted. Two firemen previously transferred to Coapman have been recalled to their home seniority districts. One permanent vacancy was under bulletin for firemen August 4. When a fireman leaves the extra list because of this permanent vacancy the extra list will be depleted and while calling for three men.

This fireman starting vacation August 16, notified the carrier December 1960, of his request for vacation to commence August 16, 1961. The carrier had in excess of seven months

Defendants' Exhibit 49

time to have a fireman available to permit vacation assignments.

There does not seem to be any logical excuse for this shortage of firemen on the St. Louis Division and we will appreciate your immediate action to eliminate this condition.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert
Mr. W. E. Mitchell
Mr. A. W. Bretz

Defendants' Exhibit 50

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

September 21, 1961
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Carolina and Northwestern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

We have called your attention to several instances where the working list is short and where Superintendents are violating the Mileage Rules and Vacation Agreement.

The firemen's extra board on the Carolina and Northwestern Railway at Hickory, North Carolina is exhausted. We understand that one regularly assigned engineer plans to retire January 1, 1962. Brakemen, shop employees and Southern Railway firemen have been used on the C&NW recently. This because the extra list is exhausted and no men are available for vacation vacancies or for extra trains or relief of any kind. Engineer P. D. Drum was called back from vacation to protect an extra from Hickory, North Carolina to Lenoir, North Carolina and return August 22, 1961. Engineer Drum was also called off his vacation to protect an extra Hickory to Lenoir and return August 29, 1961. No firemen were available for this extra and a Southern Railway fireman was used on this C&NW run. We do not object to this Southern Railway fireman being used on the C&NW but he should establish age on the C&NW provided he was furloughed on the Southern at the time used.

377a

Defendants' Exhibit 50

Since the list is completely exhausted on the C&NW and there are no available firemen for extra work or for relief of regular employees either when necessary to lay off or for vacation purposes, we are requesting that immediate action be taken to employ firemen on the C&NW as required by the Agreement.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. G. N. Ruff

Mr. H. E. Gilbert

Mr. W. E. Mitchell

Defendants' Exhibit 51

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

February 18, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called several times in the past to a shortage of enginemen that exists on the Birmingham Division. This is resulting in violations of the Diesel, Vacation and Mileage Agreements.

December 14, Train First No. 154 was operated Birmingham to Sheffield without a fireman.

December 14, Train Second No. 158 was operated Birmingham to Sheffield without a fireman.

December 15, Train First No. 153 was operated Sheffield to Birmingham without a fireman.

December 15, an extra freight train was operated from Birmingham to Columbus without a fireman. Actually this extra was operated by Road Foreman of Engines C. A. Barnett because there was no West End engineer available. Demoted Engineer L. P. Farley (East End Birmingham Division) was used as engineer on this train Birmingham to Columbus. Mr. Farley had never ridden over this track and was not qualified to handle the train. Road Foreman of Engines C. A. Barnett handled the train for the entire trip Birmingham to Columbus.

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These violations of the Agreement are arbitrary, wilful and should not exist. Sufficient men should be employed to comply with the Agreement.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings
Mr. J. D. McCleskey

Defendants' Exhibit 52

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

May 15, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Local Chairman L. C. Clark, Jr. has handled with Superintendent T. D. Moore, Jr. to have additional men employed to fill vacancies on the Atlanta Division South. The condition on the Atlanta Division South has been discussed with Mr. Moore on several occasions. In a letter to Mr. Moore dated May 10, 1962, he was advised of the following:

The mileage check for the extra board April 30, to become effective May 1, 1962, called for three firemen for mileage and one for vacation. This was a total of four men. There were only three men to assign to the board. A job placed under bulletin was assigned May 12, leaving only two men on the extra board.

Effective July 1, enginemen on the Atlanta Division South will fill two jobs working Rayonier Paper Mill at Jesup. As you know, these jobs are filled by the ACL January 1 through June 30, and by the Atlanta Division South July 1 through December 31. When these jobs revert to the Southern July 1, four additional enginemen will be required. There are only two extra men available at the time and when these Rayonier jobs revert to the Southern the two men currently on the

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extra list will be assigned regular jobs. The extra list will be exhausted and there will be two permanent vacancies with no man to assign. Action should be taken immediately to have men available to fill these vacancies.

In addition to this, engineers and firemen are assigned to commence vacations July 1, and there will be no men for relief.

We anticipate receiving your reply advising that men will be employed to comply with the Mileage, Vacation and Diesel Agreements.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert
Mr. J. J. Murray
Mr. L. C. Clark, Jr.

Defendants' Exhibit 53

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

May 24, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Superintendent J. W. Gessner authorized the operation of Local Freight No. 79, Greensboro to Mt. Airy, without a fireman in violation of Section 4 of Diesel Agreement May 22, 1962.

It is difficult to understand your arbitrary disregard for an Agreement signed in good faith. Section 4 of the Diesel Agreement provides—

“A fireman, or a helper, taken from the seniority ranks of firemen shall be employed on all locomotives.”

We can not condone your action in this and other cases and are requesting that Mediation Case E-240 be reactivated that we may either settle this matter or close the case out for further action.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:vs

CC: Mr. H. E. Gilbert
Mr. J. J. Murray
Mr. B. V. Glenn

Defendants' Exhibit 54

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

June 8, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Superintendent J. G. Beard authorized the operation of Train No. 57, Richmond to Danville, June 6; and Train No. 56, Danville to Richmond, June 7, 1962, without a fireman. The shortage of firemen on the Richmond Division has existed for some time. This matter has been brought to Superintendent Beard's attention several times by Local Chairman Blackwelder. Section 4 of the Diesel Agreement provides—

"A fireman, or a helper, taken from the seniority ranks of firemen shall be employed on all locomotives . . ."

We will expect your early reply advising that firemen will be employed on the Richmond Division in compliance with contractual Agreements.

Very truly yours,

/s/ S. J. MORROW
Acting General Chairman

SJM:wc

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings
Mr. J. A. Blackwelder, Jr.

Defendants' Exhibit 55

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

July 19, 1962
File 14061 A

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway System Lines
Washington 13, D. C.

Dear Mr. Tolleson:

Refer to your telegram July 19, reading as follows:

"Referring your President Gilbert's letter to me July 16, about carrier's Section 6 Notice September 16, 1960. I propose conference be resumed Tuesday, July 24. Please advise."

Our original conference was held in your office October 10, 1960. This conference was adjourned October 10, with the understanding that our conference was not concluded and we would resume discussion on a mutually convenient date. In view of the understanding and the suggestion made in your telegram July 19, I suggest conference be resumed August 14, 1962.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

BLM:wc
CC: Mr. H. E. Gilbert

Defendants' Exhibit 56

(Letterhead of Brotherhood of Locomotive Fireman
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

September 4, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Refer to your letter August 29, 1962, in reply to mine of August 22, relative to your violation of the Vacation, Diesel and Mileage Limitation Agreement.

Section 4 of the Diesel Agreement is plain and easily understood. It provides that—

“A fireman, or a helper, taken from the seniority ranks of firemen, shall be employed on all locomotives.”

This Agreement is plain and its meaning is obvious. You are violating this Agreement.

You then take the position that Section 6 of the Vacation Agreement gives the carrier a unilateral right to cancel vacations:

Section 6 of the Vacation Agreement could be invoked by the carrier in emergency cases but when such vacations are cancelled, they should be rescheduled for a later date. Vacations should not be cancelled except in emergency cases. If the carrier has a right, as you seem to think that all vacations may be cancelled—the Vacation Agreement is a nullity. You know that such interpretation cannot be placed on the Vacation Agree-

Defendants' Exhibit 56

ment. The cases that were called to your attention were vacations that were assigned in December 1961. When these vacations were cancelled in August, the Superintendent had more than nine months time to secure men to fill these vacation vacancies. This was not an emergency and to cancel vacations under such conditions would make the Vacation Agreement of no effect.

You then allege that the carrier is not responsible for violations of Article 25 (e), the Mileage Limitation Rule:

There are hundreds of bulletins that have been put out by Superintendents on all Divisions calling employees' attention to the fact that the Mileage Agreement must be complied with and failure to do so would result in discipline being applied to offenders. Former Assistant Vice President F. A. Burroughs, Jr. wrote General Chairman L. B. Johnson October 11, 1951, stating—

“With respect to the case of Engineer D. H. Daugherty, referred to in the correspondence: He stopped off on April 30, on account of mileage, *which was mandatory*, and marked up again on May 1.

Former Assistant Vice President C. D. Mackay wrote General Chairman F. C. Harrison June 10, 1946, with respect to regulating mileage of yard engineers and firemen in Atlanta. In this letter, Mr. Mackay agreed—

“If they exceed thirty-five days without some justification therefor, *they are subject to discipline . . .*”

There are many Awards of the First Division sustaining the employees' position that the carrier is responsible for the application of the Mileage Rules. The First Division has agreed with the employees in many cases that the car-

Defendants' Exhibit 56

rier is responsible for the application of the Mileage Limitation Rules. In Award 19563, the First Division with Referee Arthur W. Sempliner sustained the claim of Wabash Railroad Engineer F. E. Pidgeon for eight hours May 30, 1954, when the carrier permitted the extra list to carry five men when it stood for four. The following is quoted from that Award:

"... He was added to the extra board without the junior engineer being removed from the extra board, which resulted in a five man extra board in lieu of a four man extra board . . . As a result of the larger board, the claimant lost one day's employment due to the rotation of work assignments, for which claim is made . . .

It was the duty of the carrier to rotate assignments as between the proper number (four) as previously fixed between the Superintendent and the Chairman. Here this was not done. The list is self-executing on the basis of seniority. It is not a matter of junior engineer removing himself. An affirmative award is warranted.

AWARD: Claim sustained."

Special Board of Adjustment No. 88 sustained the claim of Southern Pacific extra and demoted engineers when extra engineers were allowed to work in violation of the Mileage Agreement December 1957. The following is quoted from Award 186.

"It is the Referee's opinion that the carrier created an obligation to the claimants who stood for the work when the carrier did not hold off engineers and permitted them to exceed the mileage in December 1957.

Claim sustained."

Defendants' Exhibit 56

In signing the Diesel, Vacation and Mileage Limitation Agreements, the carrier created an obligation to comply therewith.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:vc

Defendants' Exhibit 57

(Letterhead of Brotherhood of Locomotive Fireman
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

September 24, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called to a shortage of firemen that exists on the St. Louis Division several times in the past few months. This is resulting in violation of the Diesel, Vacation and Mileage Agreements.

This shortage of firemen on the St. Louis Division has resulted in firemen's vacations being cancelled, Article 25 (e) being violated and Section 4 of the Diesel Agreement being violated. A yard engine was operated at Coapman Yard 7:00 a.m. to 9:00 a.m., September 17, without a fireman. This movement was authorized by Superintendent of Terminals J. H. Sharp.

A road fireman, after completing a trip on Train No. 56, Princeton to Coapman, was used in yard service on the 7:00 a.m. job September 19. As you know, road and yard firemen's seniority are separate on the Southern Railway System Lines as provided in Article 26 (d) (2), which provides—

"Seniority rights of road and yard firemen will not be interchangeable . . ."

Defendants' Exhibit 57

Section 4 of the Diesel Agreement provides—

“A fireman, or a helper, taken from the seniority ranks of firemen, shall be employed on all locomotives.”

This road fireman that was used in yard service was in violation of Section 4 of the Diesel Agreement because he was not taken from the seniority ranks of yard firemen. The engine operated without a fireman September 17, was operated in violation of Section 4 of the Diesel Agreement because it provides that a helper will be employed on all locomotives.

Terminal Superintendent Sharp's action, with your consent, requiring men to exceed the mileage provided in Article 25 (e) and operating engines without a fireman in violation of Section 4 of the Diesel Agreement proves beyond any question the truth set out in my telegram to you August 13, 1962. There is no reason or excuse for these arbitrary violations of the Agreement and we request your cooperation in in correcting this situation.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert

Mr. J. W. Jennings

Mr. A. W. Bretz

Defendants' Exhibit 58

(Letterhead of Brotherhood of Locomotive Fireman
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

October 6, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called to the shortage of firemen that exists on the Charlotte Division several times in the past few months. This is resulting in the violation of the Diesel, Vacation and Mileage Agreements.

The 3:15 p.m. Chamblee Switcher was operated on the Charlotte Division South September 30, 1962, without a fireman. This is a violation of Section 4 of the Diesel Agreement which provides—

“A fireman, or a helper, taken from the seniority ranks of firemen, shall be employed on all locomotives . . .”

In addition to the fact that the Chamblee Switcher was operated without a fireman September 30, your attention is called to the fact that the extra list is exhausted, firemen are being required to work through vacations and violate mileage agreement.

392a

Defendants' Exhibit 58

This condition should not exist and we request that action be taken to correct same now.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:we

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings
Mr. J. P. Fitzpatrick

Defendants' Exhibit 59

(Letterhead of Brotherhood of Locomotive Fireman
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

November 9, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called in the past to a shortage of enginemen that exists on the *Atlanta Division South*. This is resulting in violations of the Diesel, Vacation and Mileage Agreements.

Local Chairman R. P. Ellis advised that Train No. 91, the Fort Valley Local, was operated November 7, Atlanta to Fort Valley without a fireman. This assignment returned Fort Valley to Atlanta November 8, without a fireman.

November 9, the Fort Valley Local was operated, Atlanta to Fort Valley without a fireman. This run will return Fort Valley to Atlanta November 10, without a fireman unless a man is deadheaded from Atlanta to Fort Valley for this ~~run~~

Superintendent Moore has advised Local Chairman Ellis that men will not be called for temporary vacancies unless extra firemen are available. At the present time there are only two men on the extra list when the list calls for five

Defendants' Exhibit 59

men. This is a premediated violation of the Agreements referred to and we request that you recognize these Agreements by employing men to fulfill provisions thereof.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:vc

CC: Mr. R. P. Ellis
Mr. J. W. Jennings
Mr. H. E. Gilbert

Defendants' Exhibit 60

(Letterhead of Brotherhood of Locomotive Fireman
and Enginemen, Southern Railway System,
Tusculumbia, Alabama)

November 23, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called several times in the past few months to a shortage of *enginemen* that exist on the Second District CNO&TP. This is resulting in violation of the Vacation, Diesel and Mileage Agreements.

Road Foreman of Engines Fox was used as fireman on the yard engine at Somerset November 9, 12, 13, 14, 15 and 16.

Road Foreman of Engines Fox was used as fireman on the yard engine at Oakdale November 17.

This is an arbitrary violation of Section 4 of the Diesel Agreement which provides—

“A fireman, or a helper, taken from the seniority ranks of firemen, shall be employed on all locomotives.”

Defendants' Exhibit 60

This violation of the Agreement is uncalled for and should not exist. We will appreciate your immediate action to correct this condition.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:vc

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings
Mr. G. T. Jones

Defendants' Exhibit 61

December 10, 1962. t/s

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Mr. McCollum:

Referring to your letter of November 23, file 14032 V-1, alleging, among other things, violation of the Diesel Agreement on the Second District, CNO&TP, by operating a yard engine at Somerset, Ky., on November 9, 12, 13, 14, 15 and 16, and at Oakdale, Tenn., November 17, 1962, without a fireman:

There was no one in the seniority ranks of firemen and there was no violation of the Diesel Agreement on any of these dates.

You are wrong in saying that the Road Foreman of Engines served as fireman on these dates. As you well know, from time immemorial, officers of various ranks have ridden any and all trains and engines to supervise the work, to see that it is properly carried out and that our customers are properly served. Reports from Road Foreman of Engines Fox are to the effect that his functions on these dates were purely supervisory. Your statement simply isn't true. The Road Foreman didn't do anything that has ever been done by a fireman.

Incidentally, you wrote me another letter, same date, same file number, advising that Local Chairman Jones had requested that Second District furloughed *road* firemen be

Defendants' Exhibit 61

given seniority as *yard* firemen. This has been done on the Second District, in conformity with the 1960 Agreement. Mr. Ford orally advised you of this sometime ago.

Incidentally, you refer to enginemen. Enginemen and firemen are not the same jobs. There is no shortage of enginemen and there will be none.

Very truly yours,

Signed—L. G. TOLLESON

Assistant Vice President,
Labor Relations.

Defendants' Exhibit 62**BALLOT**

June 27, 1960

Mr. R. L. McCollum
General Chairman, BLF&E
Southern Railway System
First National Bank Building
Tuscumbia, Alabama

Dear Sir:

I have carefully read the attached statement accompanying this strike ballot, which statement is dated June 27, 1960, and addressed to members BLF&E General Grievance Committee. A full and complete understanding of which is acknowledged by affixing my signature hereto.

Unless the issue involved in the said statement is resolved on a basis satisfactory to the Officers of the Grand Lodge and General Chairman, I am

For

Against

a peaceful and orderly withdrawal from the service of the Southern Railway System Lines. I further stipulate that this ballot authorizes our representatives to accept or agree upon a settlement of the issues in this dispute on such terms and conditions as may in their judgment be deemed prudent and advisable.

.....
Local Chairman

Date

Lodge Number

Defendants' Exhibit 63

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

December 3, 1962
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called several times in the past to a shortage of firemen that exists on the Atlanta Division South. This is resulting in violations of the Mileage, Vacation and Diesel Agreements.

Train No. 153 was operated with a Road Foreman of Engines acting as fireman, Macon to Brunswick, November 26.

Train No. 52 was operated Brunswick to Macon without a fireman November 27. This is a violation of Section 4 of the Diesel Agreement, which provides—

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; . . . "

401a

Defendants' Exhibit 63

This violation of the Agreement occurred at Macon regardless of the fact that two firemen were available on their layover days for use on this run.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert

Mr. J. W. Jennings

Mr. L. C. Clark, Jr.

Defendants' Exhibit 64

December 10, 1962. t/s

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Mr. McCollum:

Yours of December 3, file 14032 V-1, alleging, among other things, violation of the Diesel, Mileage and Vacation Agreements by operation of Train No. 153 Macon to Brunswick, November 26, without a fireman, and Train No. 52 Brunswick to Macon, without a fireman, November 27, 1962:

You are mistaken in thinking that there was anyone in the seniority ranks of firemen standing to be used on these trains. In the circumstances, there was no violation of the Diesel Agreement and no charge has been made to that effect by any of our employees.

Nor has there been any violation of the Vacation and Mileage Agreements—certainly our employees are not so contending.

You are also wrong in saying that a Road Foreman of Engines acted as fireman on 153 on November 26. As you well know, from time immemorial, officers of various ranks have ridden any and all trains or engines to supervise the work, to see that it is properly carried out and that our customers are properly served. I have a report from Road Foreman of Engines Evans that his functions on Train 153

403a

Defendants' Exhibit 64

were purely supervisory. I point out your statement isn't true; that Evans didn't do anything that has ever been done by a fireman.

Very truly yours,

Signed—L. G. TOLLESON
Assistant Vice President,
Labor Relations.

Defendants' Exhibit 65

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

January 7, 1963
File 14032 V-1

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway Company
Washington 13, D. C.

Dear Mr. Tolleson:

Your attention has been called several times in the past to a shortage of enginemen that exists on the Charlotte Division. This is resulting in violation of the Diesel, Vacation and Mileage Agreements.

December 27, Train Second No. 61 and Second No. 62 (Kannapolis Switcher) was operated without a fireman. This is a violation of Section 4 of the Diesel Agreement, which provides that a fireman taken from the seniority ranks of firemen shall be employed on all locomotives.

Sufficient men should be employed to comply with the current collective bargaining Agreements.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

BLM:wc

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings
Mr. L. H. McWhorter

Defendants' Exhibit 66

July 13, 1960. t/s

H-291-18-58

Mr. W. E. Mitchell, Vice President,
Brotherhood of Locomotive Firemen and Enginemen,
4611 Sussex Place,
Savannah, Georgia.

Dear Mr. Mitchell:

Your Western Union night letter of the 11th about hiring firemen is indeed surprising. Moreover, it is disappointing to me because you have evidently overlooked the agreement recently negotiated with you.

I remind you that when I conferred with you and General Chairman McCollum on March 24-25, 1960, about complaints Mr. McCollum himself had filed with me concerning alleged violation of certain rules of the Firemen's Agreement, I called attention to the fact that there was a total of about 730 firemen cut off Southern Railway System Lines. I then explained that the Company feels that if and when additional men are needed on a particular seniority district, the proper and, obviously, fairest thing to do is to take men cut off on other seniority districts, thus giving them employment. You agreed. We then discussed and tentatively agreed upon specific rules under which a man cut off on his home seniority district who is hired on another seniority district may retain his seniority on his home district. You asked that I prepare and send the agreement to Mr. McCollum, saying that under the bylaws of your Organization it would be necessary, before he executed it, to obtain approval of the Local Chairman. The following day I sent

Defendants' Exhibit 66

Mr. McCollum draft agreement for his signature and furnished you copy of it. On April 5, Mr. McCollum returned the agreement which he had executed. Under its terms, it became effective April 22, 1960.

Since that time, I have written a letter to each cut off fireman, sending copy of the agreement and advising him that there was need for firemen on thirteen seniority districts. With that letter I enclosed a self-addressed, stamped postal card, which I asked be filled out and mailed to me by the cut off fireman indicating his first, second and third choice. You will recall that when you and Mr. McCollum were recently here, I furnished each of you copy of my letter to cut off firemen and explained what had been done. Our records now show that the need for firemen has been filled on practically all seniority districts listed in my letter to the cut off firemen. We are communicating with other cut off firemen for the purpose of giving them employment on seniority districts where there is need for additional firemen, and will continue to do so. There can be no dispute with your Organization. To the contrary, your Organization has agreed with the Company that where there is need for firemen on a particular seniority district, such need shall be filled by using firemen cut off on other seniority districts. We are complying with the provisions of the agreement.

Under the circumstances, I do not understand why the General Grievance Committee has voted to set a strike and why a conference is desired. However, I am agreeable to

407a

Defendants' Exhibit 66

discussing the matter with you at 10:00 A.M., Tuesday,
July 19.

Very truly yours,

Signed—L. G. TOLLESON
Director of Labor Relations

Copy to:

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama

Copy to:

Mr. H. E. Gilbert, President,
Brotherhood of Locomotive Firemen and Enginemen,
318 Keith Building,
Cleveland 15, Ohio.

As information,
L. G. Tolleson.

[Handwritten notation—I handed Mr. McCollum his copy
in Mr. Ford's office at 4:00 P.M. today—L G T 7/13]

Defendants' Exhibit 67

Western Union Telegram Form

LLE147 WB076

1962 JUN 4 PM 2 50

(LL) DL PD FAX WASHINGTON DC 4 216P EDT

L G TOLLESON, ASST VP LR

SOUTHERN RAILWAY SYSTEM

15 & K STS NORTHWEST WASHDC

RE CASE E-240 SOUTHERN RAILWAY AND BLF&E
BOARD HAS CONSIDERED REPORT OF MEDIATOR
ROADLEY'S RECENT HANDLING AND HAS AU-
THORIZED CLOSING OF THIS FILE AS OF THIS
DATE. JOINT TOLLESON, GILBERT

E C THOMPSON EXEC SECY NMB.

Defendants' Exhibit 69

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Southern Railway System,
Tuscumbia, Alabama)

July 19, 1962

File 14061 A

Mr. L. G. Tolleson
Assistant Vice President Labor Relations
Southern Railway System Lines
Washington 13, D. C.

Dear Mr. Tolleson:

Refer to your telegram July 19, reading as follows:

"Referring your President Gilbert's letter to me July 16, about carrier's Section 6 Notice September 16, 1960. I propose conference be resumed Tuesday, July 24. Please advise."

Our original conference was held in your office October 10, 1960. This conference was adjourned October 10, with the understanding that our conference was not concluded and we would resume discussion on a mutually convenient date. In view of the understanding and the suggestion made in your telegram July 19, I suggest conference be resumed August 14, 1962.

Sincerely yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

CC: Mr. H. E. Gilbert

410a

Defendants' Exhibit 70

July 23, 1962. t/s

F-15224

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Mr. McCollum:

Yours of July 19, file 14061-A, in response to my telegram of that date, proposing that we resume conference Tuesday, July 24, on Carriers' Section 6 Notice of September 16, 1960:

You suggest that we commence conference August 14 instead of July 24. If you cannot make it earlier, I am agreeable to that date. Please understand that we do not want this matter dragged out and that it is our intention, and we hope yours, to bargain in good faith.

Very truly yours,

Signed—L. G. TOLLESON
Assistant Vice President,
Labor Relations.

Copy:

Mr. H. E. Gilbert, President,
Brotherhood of Locomotive
Firemen and Enginemen,
318 Keith Building,
Cleveland 15, Ohio.

As information.

L. G. Tolleson.

Defendants' Exhibit 71

(Letterhead of Brotherhood of Locomotive, Firemen
and Enginemen, Southern Railway System,
Tuscumbia, Alabama)

Ralph L. McCollum
General Chairman

November 12, 1962

C O P Y

Local Chairmen and Recording Secretaries
All Lodges B. of L. F. & E.
Southern Railway System Lines

Dear Sirs and Brothers:

You have been advised through the Monthly Reports and in separate correspondence about the Manpower situation. A strike vote was taken July 15, 1960. The vote was 100% "for", unless an understanding could be reached with the carrier to comply with our Agreement.

Your Committee was unable to reach an agreement with the Management and a strike date was set for July 26, 1960. The Mediation Board profered its service and the date was postponed.

The dispute was handled with assistance of Mediation Board from July 26, 1960, to June 4, 1962. The Board advised President Gilbert June 4, 1962, that they had exhausted their efforts to dispose of the case and closed the file.

This action of the Board released the Committee. In order to exhaust every effort for a peaceful settlement, we decided to seek a preliminary injunction in the United States District Court for the District of Columbia. Each of you have a copy of my September 21, 1962, letter addressed to

Defendants' Exhibit 71

Chairmen and Recording Secretaries, enclosing a copy of our complaint. We have been delayed in court. The carrier has since issued instructions that a fireman's temporary vacancy will not be filled unless an *extra* fireman is available. The extra list at several points is depleted. The carrier has arbitrarily refused to employ firemen. This merely means that firemen will not be used in the future and this regardless of Section 4 of the Diesel Agreement, which provides,—

“A fireman, or a helper, taken from the seniority ranks of firemen shall be employed on all locomotives . . .”

Vice President J. W. Jennings and I will make an effort to reach an understanding with Assistant Vice President Labor Relations L. G. Tolleson, beginning November 13. If we cannot reach an agreement with Mr. Tolleson, we will attempt to reach an agreement with President D. W. Brosnen.

If we are unable to reach an agreement with Management, we will attempt, through our Attorneys, to speed up court action. Should both of these efforts fail, we will be forced to authorize strike action. Each Local Chairman and other Local Lodge Officers should proceed immediately to have strike banners printed, as you may receive a short notice. You may advise your members of developments and that a strike date will be set unless the court will take action *soon* or an agreement is reached with Management. If and when a strike date is set, you must be prepared for a short notice.

The carrier operated Train No. 153, Macon to Brunswick without a fireman November 10. The crew experienced so much trouble and delay that they were turned back on

Defendants' Exhibit 71

Train No. 52 without rest. The carrier knew this crew could not complete the trip within Sixteen Hours and had a Road-foreman and Trainmaster ride Train No. 52. This Road-foreman and Trainmaster took over at Jesup and completed the trip, 147 miles to Macon. The carrier did not call a Conductor, Engineer, Fireman, Brakeman or Flagman for this trip, Jesup to Macon.

We must call a halt to these arrogant violations of our Agreement. If it takes a strike—we have no other choice or alternative.

Fraternally yours,

(signed) R. L. McCOLLUM
General Chairman

RLM:vc

CC: Mr. H. E. Gilbert
Mr. J. W. Jennings

Excerpts from Plaintiff's Exhibit 2

This agreement is entered into between Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, New Orleans and Northeastern Railroad Company, The New Orleans Terminal Company, Georgia Southern and Florida Railway Company, and St. Johns River Terminal Company, respectively, and the employees of said carriers as represented respectively by the Brotherhood of Locomotive Firemen and Enginemen, and is to be construed as a separate agreement by and between and in behalf of each of said carriers and its said employees as represented by the Brotherhood of Locomotive Firemen and Enginemen.

• • • • •

(Applicable to Southern-CNO&TP-AGS-
NO&NE-GS&F-NOT-StJRT)

A G R E E M E N T

This Agreement entered into this 17th day of May, 1950, by and between the carriers listed in Appendices (A), (B) and (C), attached hereto and made a part hereof, represented by the duly authorized Eastern, Western and Southeastern Carriers' Conference Committees signatory hereto, as party of the first part, and the Locomotive Engineers, Firemen, Helpers, Hostlers and Outside Hostler Helpers of said carriers, as respectively indicated by said Appendices (A), (B) and (C), and represented by the Brotherhood of Locomotive Firemen and Enginemen signatory hereto by its duly authorized Diesel Committee and International President, as party of the second part,

*Excerpts from Plaintiff's Exhibit 2***WITNESSETH:**

WHEREAS, on or about June 30, 1947, certain proposals on behalf of the classes of employees hereinbefore referred to were served on the carriers parties hereto by the Brotherhood of Locomotive Firemen and Enginemen; and

WHEREAS, on or about June 30, 1947, certain proposals on behalf of the carriers parties hereto were served on employees of said carriers represented by the Brotherhood of Locomotive Firemen and Enginemen; and

WHEREAS, a hearing was conducted by a President's Emergency Board (No. 70) and said Board on September 19, 1949, filed its report together with its Findings and Recommendations with the President of the United States; and

WHEREAS, the parties have conferred with respect to said proposals of June 30, 1947, and said Emergency Board Report of September 19, 1949:

NOW THEREFORE it is agreed:

SECTION 1—Effective June 1, 1950, except as hereinafter specifically provided, the provisions of this agreement become effective upon the carriers parties hereto and supersede the provisions of the following regional agreements only with respect to carriers parties hereto which also were parties to such regional agreements:

- (a) Memorandum of Agreement, dated August 13, 1943, signed on behalf of employees represented by the Brotherhood of Locomotive Firemen and Enginemen and railroads represented by the Eastern Carriers' Conference Committee.

Excerpts from Plaintiff's Exhibit 2

- (b) Memorandum of Agreement, dated November 27, 1943, signed on behalf of employees represented by the Brotherhood of Locomotive Firemen and Engineers and railroads represented by the Western Carriers' Conference Committee.
- (c) Memorandum of Agreement, dated May 11, 1944, signed on behalf of employees represented by the Brotherhood of Locomotive Firemen and Enginemen and railroads represented by the Southeastern Carriers' Conference Committee.

SECTION 2—All existing rates of pay shall remain in effect, except that effective August 1, 1950, the basic daily rates of pay for firemen on oil-burning steam locomotives and for helpers on electric locomotives which are lower than those in effect, on the respective railroads in the respective classes of service, for firemen on coal-burning steam locomotives, shall be raised to such coal-burning steam locomotive rates.

SECTION 3—Steam locomotives of the 4-8-4 and 2-10-4 type to be reclassified for pay purposes by being moved into the next higher wage bracket. No further change will be required where rates have already been so adjusted.

SECTION 4—A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; provided that the term "locomotives" does not include any of the following:

- (a) Diesel-electric, oil-electric, gas-electric, other internal combustion, steam-electric, or electric, of not more than 90,000 pounds weight on drivers in service per-

Excerpts from Plaintiff's Exhibit 2

formed by yard crews within designated switching limits.

NOTE 1: Such power installed subsequent to June 1, 1950, shall be considered "locomotives."

NOTE 2: Where agreements in effect as of May 17, 1950, require a fireman (helper) be employed on such locomotives in yard service, such agreements shall continue in effect.

(b) Electric car service, operated in single or multiple units.

(c) Gasoline, Diesel-electric, gas-electric, oil-electric or other rail motor cars, which are self-propelled units (sometimes handling additional cars) but distinguished from locomotives in having facilities for revenue lading or passengers in the motor car; except that new rail motor cars installed after March 15, 1937 which weigh more than 90,000 pounds on drivers shall be considered "locomotives."

If the power plants of existing rail motor cars be made more powerful by alteration, renewal, replacement, or any other method, to the extent that more trailing units can be pulled than could have been pulled with the power plants which were in the rail motor cars on March 15, 1937, such motor cars, if then weighing more than 90,000 pounds on drivers shall be considered "locomotives."

Note: Budd Diesel cars, or new cars of similar type, will be considered "locomotives" if they weigh more than 90,000 lbs. on power driven wheels, operated either singly or in multiple.

Excerpts from Plaintiff's Exhibit 2

- (d) Self-propelled machines used in maintenance of way, maintenance of equipment, stores department, and construction work, such as locomotive cranes, ditchers, clam-shells, pile-drivers, scarifiers, wrecking derricks, weed burners, and other self-propelled equipment or machines. This will not prejudice local handling on individual railroads where disputes arise as to whether or not the character of work performed by these devices constitutes road or yard engine service.

SECTION 5—On multiple-unit Diesel-electric locomotives on high-speed, streamlined, or main line through passenger trains a fireman (helper) shall be in the cab at all times when the train is in motion.

NOTE 1: The term "main line through passenger trains" includes only trains which make few or no stops.

NOTE 2: This rule shall be strictly observed by firemen (helpers) and the carriers will not permit instructions to be issued to the contrary. The carriers shall post notices in the cabs or on bulletin boards according to the custom of the road, advising that firemen (helpers) who violate this rule shall be subject to discipline. No claim or grievance will be made with respect to any discipline assessed for violation of this rule.

If compliance with the foregoing requires the service of an additional fireman (helper) on such trains to perform the work customarily done by firemen (helpers), he shall be taken from the seniority ranks of the firemen, in which event the working conditions and rates of pay of each fire-

Excerpts from Plaintiff's Exhibit 2

man shall be those which are specified in the fireman's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

Nothing contained herein requires that two men shall be in the cab at all times when the train is in motion or the assignment of an additional or second fireman (helper) on multiple-unit Diesel-electric locomotives in any other class of service, but if an additional man is employed to perform the work customarily performed by firemen (helpers) such man shall also be taken from the seniority ranks of the firemen and his working conditions and rates of pay shall be those which are specified in the firemen's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

This agreement is without prejudice to the practice of employment or non-employment of Diesel maintainers, instructors or supervisory employees; it being understood, however, that such employees will not be used to perform the work customarily done by firemen (helpers).

Nothing contained herein requires the assignment of an additional or second fireman (helper) on straight electric locomotives in multiple-unit operation.

SECTION 6—(a) Existing rates of pay which are higher than those herein provided shall not be reduced. If a rate higher than those provided by this agreement is in effect by reason of some special agreement with an individual carrier, such differential in rates shall be preserved.

(b) Existing differentials for divisions or portions thereof; or mountain or desert territory as compared with valley territory, whether expressed in rates or in constructive mileage allowances, shall be preserved.

Excerpts from Plaintiff's Exhibit 2

(c) Except as specifically provided herein, this agreement does not change in any manner or supersede existing agreements covering rates of pay, rules, and working conditions of locomotive engineers, firemen, helpers, hostlers, and outside hostler helpers represented by the Brotherhood of Locomotive Firemen and Enginemen.

(d) The foregoing paragraphs (a), (b) and (c) of this Section 6 have no effect upon existing rates nor upon the rates of pay established in accordance with Section 2 hereof.

SECTION 7—Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement or of the agreements identified in Section 1 hereof, may be referred by either the carrier or representatives of the employees concerned to a committee, the carrier members of which shall be members of the Carriers' Conference Committees signatories hereto or their successors or representatives; and the Brotherhood members of which shall be the International President, or his representative, together with nine General Chairmen selected by the Brotherhood. Interpretation or application agreed upon by such committee shall be final and binding upon the parties to such dispute or controversy.

This provision is not intended to prohibit the parties from filing claims with the National Railroad Adjustment Board in the manner provided in the Railway Labor Act as amended, but if the committee provided for herein agrees upon an interpretation or application of the affected provisions of the agreement, such claims shall be withdrawn and settled in accordance with the decision of the committee.

NOTE: This provision does not supersede the provisions of the two Arbitration Agreements executed this date.

Excerpts from Plaintiff's Exhibit 2

SECTION 8—This agreement is subject to approval of the courts with respect to such of the carriers, parties hereto, as are in the hands of Receivers or Trustees.

SECTION 9—This is a separate agreement by and on behalf of each of the carriers listed in Appendices (A), (B) and (C), attached hereto and made a part hereof, and their employees represented by the Brotherhood of Locomotive Firemen and Enginemen and, together with two arbitration agreements of even date, is in full settlement of the proposals of both parties served on or about June 30, 1947, and shall continue in effect, subject to change under the provisions of the Railway Labor Act, as amended.

Signed at Chicago, Illinois, this 17th day of May, 1950.

(Signatures not here reproduced)

• • • • •

Excerpts from Plaintiff's Exhibit 3**MEMORANDUM OF AGREEMENT**

This Agreement entered into this 11th day of May, 1944, by and between the carriers listed in Appendix (A), attached hereto and made a part hereof, represented by the duly authorized Southeastern Carriers' Conference Committee signatory hereto, as party of the first part, and the locomotive firemen, helpers, hostlers and outside hostler helpers of said carriers, as represented by the Brotherhood of Locomotive Firemen and Enginemen signatory hereto by its duly authorized General Chairmen and International President, as party of the second part.

WITNESSETH:

WHEREAS, on or about May 10, 1941, certain proposals on behalf of the classes of employees hereinbefore referred to were served on the carriers parties hereto by the Brotherhood of Locomotive Firemen and Enginemen; and

WHEREAS, a hearing was conducted by a President's Emergency Board and said Board on or about May 21, 1943, filed its Report together with its Findings and Recommendations with the President of the United States; and

WHEREAS, at the request of the President of the United States by letter dated May 29, 1943, the parties have conferred with respect to said proposals of May 10, 1941, and said Emergency Board Report of May 21, 1943:

NOW THEREFORE IT IS MUTUALLY AGREED:

1. To put into effect subject to requisite governmental approval and upon such approval being obtained, rates for Firemen, Helpers, Hostlers and Outside Hostler Helpers, as specifically set out in Appendixes (B) and (C) attached hereto and made a part hereof.

Excerpts from Plaintiff's Exhibit 3

2. Steam locomotives of the 4-8-4 and 2-10-4 type to be reclassified for pay purposes by being moved into the next higher wage bracket.
3. A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; provided that the term "locomotives" does not include any of the following:
 - (a) Diesel-electric, oil-electric, gas-electric, other internal combustion, steam-electric, or electric, of not more than 90,000 pounds weight on drivers in service performed by yard crews within designated switching limits.
 - (b) Electric car service, operated in single or multiple units.
 - (c) Gasoline, Diesel-electric, gas-electric, oil-electric, or other rail motor cars, which are self-propelled units (sometimes handling additional cars) but distinguished from locomotives in having facilities for revenue lading or passengers in the motor car; except that new rail motor cars installed after March 15, 1937 which weigh more than 90,000 pounds on drivers shall be considered "locomotives."

If the power plants of existing rail motor cars be made more powerful by alteration, renewal, replacement, or any other method, to the extent that more trailing units can be pulled than could have been pulled with the power plants which were in the rail motor cars on March 15, 1937, such motor cars, if then weighing more than 90,000 pounds on drivers shall be considered "locomotives."

Excerpts from Plaintiff's Exhibit 3

(d) Self-propelled machines used in maintenance of way, maintenance of equipment, stores department, and construction work, such as locomotive cranes, ditchers, clam-shells, pile drivers, scarifiers, wrecking derricks, weed burners, and other self-propelled equipment or machines. This will not prejudice local handling on individual railroads where disputes arise as to whether or not the character of work performed by these devices constitutes road or yard engine service.

4. On multiple-unit Diesel-electric locomotives on high-speed, streamlined, or main line through passenger trains a fireman (helper) shall be in the cab at all times when the train is in motion. If compliance with the foregoing requires the service of an additional fireman (helper) on such trains to perform the work customarily done by firemen (helpers), he shall be taken from the seniority ranks of the firemen, in which event the working conditions and rates of pay of each fireman shall be those which are specified in the firemen's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

(Note—The term "main line through passenger trains" includes only trains which make few or no stops.)

Nothing contained herein requires that two men shall be in the cab at all times when the train is in motion or the assignment of an additional or second fireman (helper) on multiple-unit Diesel-electric locomotives in any other class of service, but if an additional man is employed to perform the work customarily performed by firemen (helpers) such man shall also be taken from the seniority ranks of the fire-

Excerpts from Plaintiff's Exhibit 3

men and his working conditions and rates of pay shall be those which are specified in the firemen's schedule. The rates of pay shall be determined by the weight on drivers of the combined units.

Nothing contained herein requires the assignment of an additional or second fireman (helper) on straight electric locomotives in multiple-unit operation.

5. (a) Existing rates of pay which are higher than those herein provided shall not be reduced.

If a rate higher than that provided by this agreement is in effect by reason of some special agreement with individual carriers such higher rate shall continue to be paid but need not be increased.

- (b) Existing differentials for divisions or portions thereof, regardless of how expressed in agreements on the individual railroads, shall be preserved.

- (c) Except as specifically provided herein, this agreement does not modify or supersede existing agreements covering rates of pay, rules, and working conditions of locomotive firemen, helpers, hostlers, and outside hostler helpers.

6. Insofar as the rates of pay provided for in this agreement depend upon the approval of any individual or governmental agency before becoming effective under the Stabilization Program, the parties hereto agree to join in such submission as may be necessary or desirable to seek the requisite approval of the appropriate individual or governmental agency. It is understood and agreed, however, that such rates of pay

Excerpts from Plaintiff's Exhibit 3

are not valid and binding unless and until such requisite approval has first been obtained. In the event of such approval, this agreement shall become effective ten (10) days after the date of final approval by the appropriate individual or governmental agency (the date of such approval being excluded from the computation of said ten (10) day period), except as to the rates of pay which shall be effective as of August 29, 1943, as shown in Appendix (B) and March 16, 1944, as shown in Appendix (C) attached hereto and made a part hereof. Upon such final approval being forthcoming, the effective date so determined shall be automatically inserted as the effective date of this agreement without further action of the parties hereto. (*)

7. This agreement is subject to approval of the courts with respect to such of the carriers, parties hereto, as are in the hands of Receivers or Trustees.
8. This is a separate agreement by and on behalf of each of the carriers listed in Appendix (A), and their employees represented by the Brotherhood of Locomotive Firemen and Enginemen and is in full settlement of the second party's proposals of May 10, 1941, and shall continue in effect, subject to change under the provisions of the Railway Labor Act as amended.

(*) Requisite governmental approval of the rates of pay provided for in this agreement having been obtained on May 12, 1944, this agreement becomes effective May 22, 1944, except as to rates of pay which shall be effective as of August 29, 1943, as shown in Appendix (B) and March 16, 1944, as shown in Appendix (C) attached hereto and made a part hereof.

Excerpts from Plaintiff's Exhibit 3

SIGNED AT WASHINGTON, D. C., this 11th DAY OF MAY, 1944.

For the participating carriers listed in Appendix (A):

GEO. H. DUGAN

Chairman, Southeastern Carriers'
Conference Committee

L. E. HART

C. S. CANNON

L. L. MORTON, GHD

For the participating Organization of Employees:

D. B. ROBERTSON

International President—Brotherhood of Locomotive
Firemen and Enginemen

A. J. CHIPMAN

J. C. YOUNG

J. V. FITZSIMMONS

R. B. WILKINS

H. A. HUSTED

THAD S. LEE

H. W. EVANS

W. E. MITCHELL

J. F. BAUGHMAN

APPENDIX (A)

SOUTHEASTERN RAILROADS

Which Have Authorized the Southeastern Carriers' Conference Committee to Act for Them in Connection with Notice Served by the Brotherhood of Locomotive Firemen & Enginemen Under Date of May 10, 1941, Respecting the Basis of Wage Rates for Firemen, Helpers, Hostlers and Outside Hostler Helpers, as Represented by the Brotherhood of Locomotive Firemen & Enginemen, and the Manning of Diesel-Electric, and Electric Locomotives.

Excerpts from Plaintiff's Exhibit 3

Atlanta & West Point
 Western Railway of Alabama
 Atlanta Joint Terminals
 Atlantic Coast Line
 Charleston & Western Carolina
 Clinchfield
 Central of Georgia (*)
 Chesapeake & Ohio (Includes Hocking Division)
 Georgia
 Jacksonville Terminal
 Kentucky & Indiana Terminal
 Louisville & Nashville
 Nashville, Chattanooga & St. Louis
 Norfolk & Portsmouth Belt Line
 Norfolk & Western
 Norfolk Southern
 Richmond, Fredericksburg & Potomac
 Seaboard Air Line (*)
 Southern (Including State University, and
 Northern Alabama)
 Cincinnati, New Orleans & Texas Pacific
 Alabama Great Southern (including Wood-
 stock & Blocton and Belt Railway of Chat-
 tanooga)
 New Orleans & Northeastern
 New Orleans Terminal
 Georgia Southern & Florida
 St. Johns River Terminal
 Harriman & Northeastern
 Cincinnati, Burnside & Cumberland River
 Tennessee Central

• • • • •

(*) Authority given is subject to approval of court.

*Excerpts from Plaintiff's Exhibit 3***MEMORANDUM**

Washington, D. C., May 11, 1944

Referring to agreement, signed at Washington, D. C., this date, by the Southeastern Carriers' Conference Committee and the Brotherhood of Locomotive Firemen and Enginemen:

This confirms the understanding between the parties that any dispute or controversy arising out of the interpretation or application of any of the provisions of said agreement may be referred by either a carrier or representative of its employees to a committee, the carrier members of which shall be the members of the Southeastern Carriers' Conference Committee signatories hereto or their successors or representatives; and the Brotherhood members of which shall be the International President, or his representative, together with nine general chairmen selected by the Brotherhood. Interpretation or application agreed upon by such committee shall be final and binding upon the parties to such dispute or controversy.

This provision is not intended to prohibit the parties from filing claims with the National Railroad Adjustment Board in the manner provided in the Railway Labor Act as amended, but if the committee provided for herein agrees upon an interpretation or application of any provisions of the agreement, such claims shall be withdrawn and settled in accordance with the decision of the committee.

D. B. ROBERTSON, International President
Brotherhood of Locomotive Firemen
and Enginemen.

GEO. H. DUGAN, Chairman
Southeastern Carriers'
Conference Committee.

Plaintiff's Exhibit 4

(Uniform National Carrier Proposal of November 2, 1959
Concerning Use of Firemen)

**USE OF FIREMEN (HELPERS) ON OTHER
THAN STEAM POWER**

- A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, applicable to any class or grade of train, engine or yard service employees, which require the employment or use of firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous and unclassified services) or in any class of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).
- B. Establish a rule to provide that
 - 1. Management shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in all classes of freight service (including all mixed, miscellaneous and unclassified services) and in all classes of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).
 - 2. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of paragraph 1 of this rule shall be eliminated.

Plaintiff's Exhibit 5

(Letterhead of Brotherhood of Locomotive Firemen
and Enginemen, Tuscumbia, Alabama)

September 7, 1960

File 14061 A

Mr. F. A. Burroughs
Assistant Vice President Labor Relations
Southern Railway Company
The Cincinnati, New Orleans & Texas
Pacific Railway Company
Harriman and Northeastern Railroad Company
The Alabama Great Southern Railroad Company
New Orleans and Northeastern Railroad Company
Georgia Southern and Florida Railway Company
St. Johns River Terminal Company
The New Orleans Terminal Company
Washington 13, D. C.

Dear Sir:

In accordance with provisions of the Railway Labor Act, as amended, and the agreement, or agreements, now in effect on the above listed properties, please accept this as formal notice of our desire to change the provisions of said agreement, or agreements, governing rates of pay and rules of the employees on said railroads represented by the undersigned, as indicated in the attached proposal.

Since like notice is being served by the operating railway labor organizations on you and other carriers, this date, we suggest waiving the procedures under the Railway Labor Act requiring conferences on this property and refer the matter to the Carrier's Conference Committee for na-

Plaintiff's Exhibit 5

tional handling concurrently with your notice of November 2, 1959, served upon employees of this railroad represented by the Brotherhood of Locomotive Firemen and Engineers.

Please acknowledge receipt and advise whether or not you are agreeable to waive conference on the property and refer the subject matter of the attached proposal to the Carriers' Conference Committee for concurrent handling as suggested herein.

Very truly yours,

/s/ R. L. McCOLLUM
General Chairman

RLM:wc

Enc.

CC: Mr. H. E. Gilbert

Plaintiff's Exhibit 5

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN
ORDER OF RAILWAY CONDUCTORS
AND BRAKEMEN
BROTHERHOOD OF RAILROAD TRAINMEN
SWITCHMEN'S UNION OF NORTH AMERICA**

PROPOSAL

- A. Negotiate agreements providing for the following:**
- 1. Improvements in the existing wage structure including but not limited to provision for adequate compensation for night work and shift differentials, daily, weekly and monthly guarantees, payment for time held away from home and improved overtime rules.**
 - 2. Consist of crews including Engineers (Motormen), Firemen (Helpers), Conductors, Brakemen, Hostlers, Hostler Helpers, Yard Conductors (Foremen) and Yard Brakemen (Helpers), the adequacy of the number of men in the crew and their qualifications and training.**
 - 3. Financial and other protection of employees affected by mergers, consolidations, abandonments, technological changes in operations, or by changes in working conditions.**
 - 4. Stabilization of employment.**
- B. Establish a commission to function in general conformity with the recommendation of Emergency Board No. 109 to investigate and report respecting the changes requested above and your notices of November 2, 1959, with the view of assisting the parties to arrive at an agreement.**

September 7, 1960

Plaintiff's Exhibit 6

SOUTHERN RAILWAY SYSTEM

OPERATING DEPARTMENT

WASHINGTON, 13, D.C.

September 16, 1960. t/s

F-15224

**Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.**

Dear Sir:

This will acknowledge receipt of your letter of September 7 asking me to accept your letter and attachement as formal notice, in accordance with the provisions of the Railway Labor Act, of your desire to change the provisions of agreement or agreements governing rates of pay, rules, or working conditions of employees represented by your Organization.

As your letter states you desire to revise existing agreements with employees you represent, this will constitute notice, under the Railway Labor Act, to the employees you represent of Carriers' desire to revise existing agreements in accordance with the following proposals:

- A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, which require the employment or use of a fireman (helper) on other than steam power in any class of service.
- B. Establish a rule to provide that Management shall have the unrestricted right, under all circumstances,

Plaintiff's Exhibit 6

to determine when and if a fireman (helper) shall be used on other than steam power in any class of service.

- C. The foregoing will be made applicable only through the process of attrition, i.e., through death, retirement, resignation or discharge. Men now holding seniority as fireman and/or engineer will continue to have all rights they have under the present Agreements, but hereafter Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever.

In my opinion, your proposal does not constitute a proper "notice of an intended change in agreements affecting rates of pay, rules, or working conditions" within the meaning of Section 6 of the Railway Labor Act, hence is not within the scope of mandatory bargaining, and we have no obligation to bargain with upon your proposal.

Without prejudice to that position, I advise you that I am agreeable to conferring with you with respect to your proposal at 10:00 A. M., EDT, Wednesday, October 5, and that I desire to also discuss, at that conference, the above proposals of the Carriers. If I am unable to personally confer with you, I will delegate a member of my staff to represent me.

I am not agreeable to your suggestion that we waive the procedural provisions of the Railway Labor Act, nor am I agreeable to referring the matter to a Carriers' Conference Committee for national handling.

Plaintiff's Exhibit 6

Please advise if the date and time suggested are agreeable to you.

Very truly yours,

/s/ FRED A. BURROUGHS
Assistant Vice President,
Labor Relations.

Southern Railway Company,
The Cincinnati, New Orleans and Texas Pacific
Railway Company,
Harriman and Northeastern Railroad Company,
The Alabama Great Southern Railroad Company,
New Orleans and Northeastern Railroad Company,
The New Orleans Terminal Company,
Georgia Southern and Florida Railway Company,
St. Johns River Terminal Company.

Plaintiff's Exhibit 7

(Letterhead of Southern Railway System,
Washington 13, D. C.)

October 17, 1960. t/s

F-14070-B

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Alabama.

Dear Sir:

Referring to my letter of November 2, 1959, giving notice, under our existing agreement or agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we proposed to revise and supplement such agreement or agreements in accordance with the proposal set forth in "Attachment A" appended thereto, captioned "Use of Firemen (Helpers) on Other Than Steam Power":

This is to advise you that Carriers' notice of November 2, 1959 is hereby withdrawn as of this date.

Plaintiff's Exhibit 7

Very truly yours.

/s/ F. A. BURBOWHS
Assistant Vice President,
Labor Relations.

Southern Railway Company.
The Cincinnati, New Orleans and
Texas Pacific Railway Company,
Harriman and Northeastern Railroad
Company,
The Alabama Great Southern Railroad
Company,
New Orleans and Northeastern Railroad
Company,
The New Orleans Terminal Company,
Georgia Southern and Florida Railway
Company,
St. Johns River Terminal Company.

Plaintiff's Exhibit 8

**NATIONAL MEDIATION BOARD
WASHINGTON**

May 31, 1962

**Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen
and Enginemen
318 Keith Building
Cleveland 15, Ohio**

Dear Mr. Gilbert:

The Board is in receipt of an application for mediation services from the Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Hariman and Northeastern Railroad Company, The Alabama Great Southern Railroad Company, New Orleans and Northeastern Railroad Company, The New Orleans Terminal Company, Georgia Southern and Florida Railway Company, and St. Johns River Terminal Company covering a dispute between those carriers and the Brotherhood of Locomotive Firemen and Enginemen on the following subject:

- A. Eliminate all agreements, rules, regulations, interpretations and practices which require the employment or use of a fireman (helper) on other than steam power in any class of service;
- B. Establish a rule to provide that Management shall have the unrestricted right to determine when and if a fireman (helper) shall be used on other than steam power in any class of service; and

Plaintiff's Exhibit 8

C. The foregoing will be applicable only through the process of attrition, but hereafter Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever.

Please furnish us promptly with any statement you may care to make on behalf of the organization.

Very truly yours,

/s/ E. C. THOMPSON
E. C. Thompson
Executive Secretary

cc: Mr. Lawson G. Tolleson
Asst. Vice President
Labor Relations
Southern Railway System
c/o Southern Railway Bldg.,
Washington 13, D. C.

PLEASE MAKE SUBMISSION AND REPLIES
TO CORRESPONDENCE IN DUPLICATE

Plaintiff's Exhibit 9

**SOUTHERN RAILWAY SYSTEM
WASHINGTON 13, D. C.**

**D. W. BROSNAN
PRESIDENT**

December 12, 1962. *

Dear Mr. Gilbert:

I returned your telephone call of Friday afternoon, December 7th, but was unable to reach you in Washington. On Monday, December 10th, I called you in Cleveland, as you had suggested.

In that conversation you referred to what you described as a "critical situation" on Southern with respect to Southern's firemen. I told you there had been no unrest or difficulty with Southern's firemen, but that from information reaching me from many firemen on various parts of our railroad it is clear that you and/or your subordinates are making an all-out effort to cause a strike.

You said there was unrest caused by violations of the agreements. I asked you to name the violations. You said that there were three, viz., (1) refusal to allow firemen to take vacations, (2) forcing firemen to exceed their mileage, and (3) failure to employ new firemen.

As to Item 1, I advised you that all firemen entitled to vacations are free to take them. If they work their vacations, they are allowed pay therefor. This is in accordance with the agreements. I said to you that there have been no complaints from firemen with respect to this matter. You stated that organization representatives have com-

[Handwritten notations—Put in file—no ans. for present, 12-21-62, SCP. Copy made and referred to Heiss]

Plaintiff's Exhibit 9

plained. I told you I understood this was correct, but that there had been no complaints from any of the men themselves.

As to Item 2, I advised you that we don't keep track of the mileage; that it is the responsibility of each fireman to keep track of his own mileage and to notify his call office if he wants to lay off because of mileage. I also told you there have been no complaints from firemen about this matter. You said representatives of the organization have complained. I told you that if any fireman wants to lay off for mileage, he should notify his call office, and he will be accommodated, but that we will not force this.

As to Item 3, I advised you that Southern has no need for any firemen at all, but that, as you well know, we have said that all men presently holding seniority as firemen in road or yard service will be permitted to work out their time with Southern as and when they stand for work—provided, of course, not dismissed for cause. I advised you that Southern will not employ new men as firemen. You took the position that we must provide firemen to relieve other firemen who are taking vacations or laying off for mileage. I said to you that we will not employ new men, but repeated that any man wanting to take his vacation or lay off for mileage can do so.

You also said that Assistant Vice President L. G. Tolleson had refused to see one of your vice presidents to discuss the three subjects which you and I talked about. I told you that I was not familiar with that handling but that I would have a look at it, and that I felt that Mr. Tolleson would discuss the general situation of vacations and mileage with your man. I stated that we will not employ new men as firemen and that it will be useless to discuss that

Plaintiff's Exhibit 9

matter. Further, that if the purpose of the conference was to discuss the employment of new firemen to fill vacancies of men on vacation or of men who have made their mileage, such meeting would serve no useful purpose.

I have reviewed this entire matter with Mr. Tolleson. I do not find that he has refused to talk with your vice president. To the contrary, I find that in his letter of November 16th to you, Mr. Tolleson said that he would meet your people to discuss any grievances or claims that had been processed to him as provided in our agreements. I also find that he replied in the same way, by his letter of November 19th, to your vice president, Mr. J. W. Jennings, in response to Mr. Jennings' letter to him of November 17th. To date, Mr. Tolleson has had no word from either Mr. Jennings or you about such a conference.

As I said to you, it is futile to discuss alleged grievances or time claims when none have been filed or progressed in the manner prescribed by the agreements. Nevertheless, in an effort to be helpful, Mr. Tolleson will write Mr. Jennings again, setting out his willingness to meet him for any useful discussions. In doing so, and in view of the foregoing, the matter of vacations and mileage can only be discussed in general terms and not with the view of employing new firemen.

Yours truly,

/s/ D. W. BROSNAN

Mr. H. E. Gilbert, President,
Brotherhood of Locomotive Firemen and Enginemen,
318 Keith Building,
Cleveland 15, Ohio.

Plaintiff's Exhibit 11

Historical References to Alleged Violations of the
National Diesel-Electric Agreement of 1937 by the
Southern Railway System. (viz.)

Southern Railway Company,
The Cincinnati, New Orleans and Texas Pacific
Railway Company,
Harriman and Northeastern Railroad Company,
The Alabama Great Southern Railroad Company,
New Orleans and Northeastern Railroad Company,
The New Orleans Terminal Company,
Georgia Southern and Florida Railway Company,
St. Johns River Terminal Company.
Carolina and Northwestern Railway Company.

PERIOD 1959

JULY 13—

Atlanta Division South of Macon, Train No. 66, porter
used as fireman.

JULY 16—

Atlanta Division South of Macon, Train No. 67, porter
used as fireman.

JULY 17—

Atlanta Division South of Macon, Train No. 66, porter
used as fireman.

JULY 27—

Atlanta Division South of Macon, Train No. 67, porter
used as fireman.

Plaintiff's Exhibit 11

JULY 30—

Atlanta Division South of Macon, Train No. 66, porter used as fireman.

DECEMBER 6—

2nd District CNO&TP, Brakeman R. L. Cox used as fireman.

DECEMBER 6—

2nd District, CNO&TP, Brakeman P. W. Stine used as fireman.

PERIOD JANUARY 1, 1960-JUNE 30, 1960

FEBRUARY 5—

1st District CNO&TP, Switchman P. E. Greimme used as fireman.

MARCH 9—

Louisville Division, Lawrenceburg local operated without a fireman.

APRIL 26—

Atlanta Division, Hostler Helper J. C. Dennard used as fireman.

APRIL 27—

Atlanta Division, Brakeman G. H. Cunard used as fireman.

APRIL 27—

Yard engine operated in Alexandria, Virginia Yard without fireman.

Plaintiff's Exhibit 11

MAY 23—

Atlanta Division, Hostler Helper George Howard used as fireman.

MAY 25—

Atlanta Division, Hostler Helper George Howard used as fireman.

MAY 25—

Atlanta Division, Brakeman G. H. Cunard used as fireman.

MAY 27—

Atlanta Division, Brakeman G. H. Cunard used as fireman.

JUNE 1—

Atlanta Division, Hostler Helper Porter Jackson used as fireman.

JUNE 1—

Atlanta Division, Train Second No. 153 operated Atlanta to Macon with a hostler helper being used as fireman.

JUNE 2—

Atlanta Division, Brakeman Ernest Decker used as fireman.

JUNE 6—

Brakeman used as fireman on local freight out of Richmond, Virginia.

JUNE 8—

Atlanta Division, Hostler Helper Porter Jackson used as fireman.

Plaintiff's Exhibit 11

JUNE 8—

Train Second No. 153 was operated Atlanta to Macon with brakeman being used as fireman.

JUNE 8—

Extra south was operated Atlanta to Stockbridge with a hostler helper being used as fireman.

JUNE 15—

Danville Division, 10:30 P.M. yard job operated without a fireman at Spencer, North Carolina.

JUNE 15—

Danville Division, yard engine operated at Winston Salem, North Carolina without a fireman.

JUNE 17—

Birmingham Division, Brakeman C. L. Hornbuckle used as fireman.

JUNE 27—

Richmond Division, Local Freight No. 67, Keysville, Virginia to Durham, North Carolina operated without a fireman.

JUNE 29—

N. A. District, Brakeman Mitchell used as fireman.

MAY AND JUNE (undisclosed dates) the following were used as firemen on the Richmond Division:

Yardmaster F. E. Holshouser

Yardmaster W. E. Whetslone

Yardmaster S. E. Carter

Trainman Corker

" Worsham

" Westmoreland

Plaintiff's Exhibit 11

Switchman J. O. Walker
 " B. S. Garrett
 " O. B. Owen

JUNE 16 TO 24 (specific dates undisclosed) the following
 were used as firemen on the Charleston Division:

Switchman J. E. Haddock
 " W. A. Constine
 " G. E. Beach
 " R. C. Thompson
 " J. S. Hallman
 " B. D. Delling

PERIOD JULY 1, 1960-DECEMBER 31, 1960

JULY 2—

Atlanta Division, Hostler Helper Porter Jackson used
 as fireman.

JULY 3—

Atlanta Division, Hostler Helper Porter Jackson used
 as fireman.

JULY 16—

Atlanta Division, Hostler Helper J. C. Dennard used as
 fireman.

JULY 17—

Atlanta Division, Hostler Helper J. C. Dennard used as
 fireman.

JULY 19—

Atlanta Division, Hostler Helper J. C. Dennard used as
 fireman.

Plaintiff's Exhibit 11

JULY 20—

Atlanta Division, Hostler Helper J. C. Dennard used as fireman.

JULY 31—

Atlanta Division, Hostler Helper J. C. Dennard used as fireman.

JULY 31—

Atlanta Division, Hostler Helper J. C. Dennard used as fireman.

JULY 16 to 30 (dates undisclosed) the following were used as firemen on the Charleston Division:

Switchman	Constein
"	Hendricks
"	Beach
"	Hunt
"	Haddock
"	Hallman

JULY 18-28 inclusive (except July 24)

Atlanta Division, Brakeman Cunard used as fireman.

AUGUST 4—

Work train operated out of Columbia, South Carolina, with an engineer and two Road Foremen of Engines. No fireman assigned.

AUGUST 1, 2, 3, 4, and 5—

Work train operated out of Charleston, South Carolina without a fireman.

Plaintiff's Exhibit 11

AUGUST 27—

Yard job worked at Greenville, South Carolina without a fireman.

NOVEMBER 4 & 10—

Yard engine operated on the third trick at the Charleston Yard, Charleston, S. C., without fireman.

NOVEMBER 14—

Yard engine Charleston Yard operated 2 hours and 30 minutes after fireman relieved for rest in compliance with the Hours of Service Law.

DECEMBER 24—

Local Freight Train No. 63 operated from Columbus, Mississippi to Birmingham, Alabama without a fireman.

PERIOD JANUARY 1, 1961-JUNE 30, 1961

JANUARY 16—

Passenger Train No. 27 operated between Columbia and Spartanburg, South Carolina without a fireman.

MAY 9—

Superintendent refused to assign fireman on work train out of Princeton, North Carolina.

JUNE 3—

Charleston Division, no fireman used on local freight run between Seven Mile Yard and Branchville, South Carolina.

JUNE 9—

Train No. 51, Seven Mile Yard to Columbia, South Carolina, no fireman used.

Plaintiff's Exhibit 11

PERIOD JULY 1, 1961-DECEMBER 31, 1961

JULY 19 & 20—

Carolina and Northwestern Railway Train operated from Hickory, North Carolina to Lenoir, North Carolina, and return, without a fireman.

JULY 20—

Carolina and Northwestern Railway fireman vacancy on yard assignment at Hickory, North Carolina not filled. Efforts of General Foreman at C&NW shop to secure a fireman was countermanded by Trainmaster.

JULY 22—

Work train operated out of Winston Salem, North Carolina without fireman.

AUGUST 1—

Trainmaster Woodall used as fireman on local freight out of Louisville to Beuchel, Kentucky.

AUGUST 14—

Order of Assistant Superintendent to assign fireman to yard engine at Dalton, Georgia, rescinded.

AUGUST 14, 15, 18, 21—

Yard engine operated at Dalton, Georgia, without a fireman.

OCTOBER 11—

Carolina and Northwestern Railway Train was operated from Hickory to Lenoir without a fireman. Conductor of the crew found it necessary to perform some of the duties as a fireman in addition to his own duties.

Plaintiff's Exhibit 11

OCTOBER 15—

Atlanta Division, Carman Ed Sullivan used as fireman.

OCTOBER 31—

Carolina and Northwestern Railway, extra Hickory to Lenoir and return, dispatched without fireman assigned.

NOVEMBER 1—

Carolina and Northwestern Railway, Trains 60 and 61 operated without a fireman.

NOVEMBER 1—

Carolina and Northwestern Railway, Extra, Hickory to Lenoir, North Carolina and return, dispatched without a fireman assigned.

NOVEMBER 2—

Carolina and Northwestern Railway, Extra, Hickory to Lenoir and return, dispatched without a fireman assigned.

NOVEMBER 2—

Carolina and Northwestern Railway, Trains 60 and 61 operated without a fireman.

NOVEMBER 3—

Carolina and Northwestern Railway, Extra, Hickory to Lenoir and return, without a fireman.

NOVEMBER 3—

Carolina and Northwestern Railway, Train No. 61 operated without a fireman.

NOVEMBER 4—

Carolina and Northwestern Railway, Train No. 60 operated without a fireman.

Plaintiff's Exhibit 11

NOVEMBER 6—

Carolina and Northwestern Railway, Train No. 61 operated out of Hickory, North Carolina to York, South Carolina without a fireman.

NOVEMBER 7—

Carolina and Northwestern Railway, Train No. 60 operated out of York to Hickory without a fireman.

NOVEMBER 7—

Carolina and Northwestern Railway Extra operated without a fireman.

NOVEMBER 8—

Carolina and Northwestern Railway, Train No. 61 operated Hickory to York, South Carolina without a fireman.

NOVEMBER 9—

Carolina and Northwestern Railway, Train No. 60 dispatched from York to Hickory without a fireman.

NOVEMBER 9—

Carolina and Northwestern Railway, Freight Extra operated without assigned fireman.

NOVEMBER 10—

Carolina and Northwestern Railway, Train No. 61 operated Hickory to York without a fireman.

NOVEMBER 13—

Carolina and Northwestern Railway, Train No. 61 operated Hickory to York without a fireman.

NOVEMBER 14—

Carolina and Northwestern Railway, Train No. 60 operated from York to Hickory without a fireman.

*Plaintiff's Exhibit 11***NOVEMBER 14—**

Carolina and Northwestern Extra operated without assigned fireman.

NOVEMBER 16—

Carolina and Northwestern Railway, Train No. 60 operated from York, South Carolina to Hickory, North Carolina without a fireman.

Vacancy resulted when assigned Fireman G. M. Anthony was used as an engineer on this run.

NOVEMBER 16—

Carolina and Northwestern Extra operated without a fireman.

DECEMBER 16—

Atlanta Division North, Local No. 86 was operated between Inman Yard (Atlanta) and Cleveland, Tennessee without a fireman.

DECEMBER 17—

First District, CNO&TP, Switchman O. L. Houpp used as fireman.

DECEMBER 19 & 20—

Atlanta Division, Brakeman J. A. Drake, Jr., used as fireman.

DECEMBER 19-22 (4 days inclusive)—

Atlanta Division, Hostler Helper Joe Paige used as fireman.

DECEMBER 25—

First District CNO&TP, Switchman C. Barton used as fireman.

Plaintiff's Exhibit 11

PERIOD JANUARY 1, 1962-JUNE 30, 1962

JANUARY 10—

Superintendent D. H. MacLeod authorized operation of East Local, Birmingham to Atlanta, without a fireman.

JANUARY 10—

Atlanta Division, Superintendent T. D. Moore, Jr. ordered a local freight known as the *Arkwright Turn* operated without a fireman. The fireman assigned to run was temporarily delayed by ice and snow on way to work. Local was dispatched from Inman Yard without delaying long enough for fireman to report or for calling another fireman. Fireman J. E. Echols, Jr. finally overtook local and assumed his duties at a point called Howell.

MAY 22—

Washington Division. Work train operated at Orange, Virginia without fireman.

MAY 22—

North Local operated from Greensboro, North Carolina to Mt. Airy, North Carolina without a fireman.

MAY 27 AND 28—

Superintendent E. R. Oliver authorized the operation of Train 53, Winston Salem to Charlotte May 27, and Train 52, Charlotte to Winston Salem May 28 without a fireman.

MAY 28—

Superintendent J. W. Gessner authorized the operation of Trains 65 and 64, Winston Salem to North Wilkesboro and return, without a fireman.

*Plaintiff's Exhibit 11***JUNE 1—**

CNO&TP Train No. 61, Cincinnati, Ohio to Danville, Kentucky, was authorized to operate without fireman by Superintendent V. B. Valentine.

JUNE 2—

Charlotte Yard. Trainmaster W. E. Curlee assumed duties as locomotive fireman between 3 PM and 6:45 PM, relieving Fireman E. B. Stine in order that Fireman Stine could assume duties on his regular assigned yard job. L. H. McWhorter, a qualified locomotive fireman, was available and willing to relieve Fireman Stine from his emergency assignment after 3 PM or his regular assigned job starting at 3 PM.

JUNE 6—

Richmond Division, Train No. 57, Richmond, Virginia to Danville, Virginia. Authorized by Superintendent J. G. Beard to operate without fireman.

JUNE 7—

Richmond Division, Train No. 56, Danville to Richmond, authorized by superintendent to operate without fireman.

JUNE 12—

Charlotte Division. Reports of this date disclosed that Trainmaster W. E. Curlee has instructed firemen to mark-off early in some cases so as to circumvent the requirements of the Hours of Service Act.

JUNE 14—

Carolina and Northwestern Railway Fireman W. F. Anthony, while assigned to Extra 2225-2126 northbound Hickory to Lenoir, was given message to avail himself for

Plaintiff's Exhibit 11

duty on two different southbound trains, (*viz.*), Extra 2126 and Train No. 55 on the same day. This means that both Train No. 55 and Extra 2126 were operated to some extent without a fireman.

JUNE 23—

Charlotte Division. Switchmen G. Cantrell and W. C. Hall used as firemen at Spartanburg, N. C.

JUNE 29—

Atlanta Division. Assistant Division Superintendent Williams assigned Roundhouse Foreman to serve as fireman on Passenger Train No. 7 after Engineer J. L. Echols, Sr. objected to instructions by Williams to proceed without a fireman. Qualified locomotive firemen were available in Atlanta Terminal for this assignment.

JUNE 29—

Charlotte Division, Switchman G. Cantrell was used as fireman.

JULY 1, 1962 and subsequent dates**JULY 2-5 (incl.)—**

Atlanta Division South of Macon. Southern Train Porter Andrew Driskell used as fireman Rayonier Paper Mill Job No. 1 at Jesup, Georgia.

JULY 4—

Charlotte Division, C. E. Cash (switchman) used as fireman in Hayne Yard, Spartanburg.

JULY 11—

Charlotte Division, H. T. Smith (switchman) used as fireman in Hayne Yard, Spartanburg.

Plaintiff's Exhibit 11

JULY 11—

Charlotte Division, L. J. Wood (switchman) used as fireman in Hayne Yard, Spartanburg.

JULY 13—

Charlotte Division, W. C. Hall (switchman) used as fireman in Hayne Yard, Spartanburg.

JULY 30—

Washington Division, Work train operated without a fireman.

AUGUST 6 & 7—

N. A. District Birmingham Division. Trains No. 157 and No. 158 to and from Sheffield and Birmingham, Alabama, Brakeman S. T. Ingle used as fireman.

AUGUST 6-10 (incl.)—

N. A. District Birmingham Division. Work train operated for five days without a fireman.

AUGUST 9—

Carolina and Northwestern Railway Freight Extra operated from Hickory, North Carolina to Lenoir, North Carolina and return without a fireman.

AUGUST 15—

Carolina and Northwestern Railway Train No. 61, Hickory to York, South Carolina, was operated between Hickory and Newton, North Carolina without a fireman.

AUGUST 16—

Carolina and Northwestern Railway Freight Extra in local service operated from Hickory to Lenoir and return without a fireman.

*Plaintiff's Exhibit 11***AUGUST 24—**

Carolina and Northwestern Railway Train No. 55 was operated from 11:39 PM until the completion of the run without a fireman.

AUGUST 25—

Carolina and Northwestern Railway Train No. 54 operated from Hickory to Lenoir without a fireman.

AUGUST 25—

Carolina and Northwestern Railway Train No. 55 operated from Lenoir to Hickory without a fireman.

AUGUST 25—

Carolina and Northwestern Railway Train No. 60 operated from York, South Carolina to Hickory, North Carolina without a fireman.

AUGUST 29—

Carolina and Northwestern Railway Freight Extra dispatched on a round trip between Hickory and Lenoir without a fireman.

AUGUST (Several dates undisclosed)—

Knoxville Division. Radio controlled diesel-electric units spaced back in train being operated out of Bulls Gap Tennessee. Road Foremen, Trainmasters, and Electro-Motive Division officials performing various tasks indicative of locomotive firemen.

SEPTEMBER 2—

Columbia Division. Through freight Train No. 82 operated from Columbia, South Carolina to Charlotte without a fireman.

*Plaintiff's Exhibit 11***SEPTEMBER 4—**

Atlanta Division South of Macon. The "Mead Job" was operated in the Macon Terminal between 6:30 AM and 7:12 AM without a fireman.

SEPTEMBER 5—

Carolina and Northwestern Railway Train No. 61 dispatched out of Hickory, North Carolina without a fireman.

SEPTEMBER 6—

Carolina and Northwestern Railway Train No. 60 operated York, S. C. to Hickory without a fireman.

SEPTEMBER 7—

Carolina and Northwestern Train No. 61 operated from Hickory, N. C. to Newton, N. C. without a fireman.

SEPTEMBER 17—

St. Louis Division. Superintendent of Terminals, J. H. Sharp, authorized operation of yard engine at Coapman Yard between 7 AM and 9 AM without a fireman.

SEPTEMBER 19—

Atlanta Division South of Macon. The "Mead Job" was worked between 6:30 AM and 7:30 AM at Macon without an assigned fireman.

Plaintiff's Exhibit 13

(Letterhead of Brotherhood of Locomotive Firemen and
Enginemen, Cleveland 15, Ohio)

January 8, 1963

Mr. D. W. Brosnan, President
Southern Railway System,
Southern Railway Building,
15th and K Streets, N. W.,
Washington, D. C.

Dear Mr. Brosnan:—

This has reference to your letter of December 12, 1962, written with respect to our telephone conversation on Monday, December 10. As I stated to you, my only purpose in calling you was to advise you that a critical situation on the Southern Railway exists. I further pointed out to you the only thing the Brotherhood of Locomotive Firemen and Enginemen desire in this matter is that you and your corps of officers respect and honor the rules we have in evidence between the general grievance committee of the BLF&E and the Southern Railway.

Your reference to Item 3 in Paragraph 3 does not correspond to my record in the premises. Representatives of the carrier, as well as representatives of the employees involved, have a responsibility under the Railway Labor Act, and your action and expression convey the idea you have no inclination to require your officers to fulfill their obligation under the law.

Very truly yours,

/s/ H. E. GILBERT

BC: J. W. Jennings, VP-BLF&E

R. L. McCollum, GC—Southern Ry.

Plaintiff's Exhibit 14

C O P Y

WESTERN UNION TELEGRAM

UDA 175 CTB231 1963 JAN 9 PM 3 16
CT CLA507 PD FAX CLEVELAND OHIO 9 257P EST
J W JENNINGS CARE A M LAMPLEY
400 LST ST NORTHWEST RM 704 WASHDC

IN RESPONSE YOUR WIRE JAN 8 AUTHORITY
HEREBY GRANTED TO WITHDRAW OUR MEM-
BERS FROM SERVICE ON SOUTHERN BY SYSTEM
INCLUDING CAROLINA & NORTHWESTERN BY CO,
EFFECTIVE 6:30 AM SUNDAY, JAN 13, 1963. SISTER
ORGANIZATIONS, OSR GENERAL CHAIRMEN ON
CONNECTING LINES AND ALL OTHERS CON-
CERNED WILL BE PROPERLY NOTIFIED FROM
THE GRAND LODGE OFFICE IN CLEVELAND

H E GILBERT

6:30 AM 13 1563 SISTER ORGANIZATIONS PER CY
(11)

Plaintiff's Exhibit 15

COPY

WESTERN UNION

Sending Blank

Call

Letters FJR Jan 9 1963

Charge

to BLF&E Cleveland Ohio FR

R L McCollum

First Natl. Bank Bldg.,

Tuscumbia, Ala.

Have authorized legal strike in classifications represented by our organization on the Southern Ry System, including Carolina & Northwestern Ry., for 6:30 AM Sunday, Jan 13, 1963, account continued and prolonged failure of management to comply with mileage and vacations rules in violation of Sec. 2, Seventh, of the Railway Labor Act. Please arrange to advise members of your general grievance committee accordingly.

H. E. GILBERT

Memorandum Opinion of the District Court

(Filed May 14, 1963)

UNITED STATES DISTRICT COURT**FOR THE DISTRICT OF COLUMBIA****Civil Action No. 2881-62**

[SAME TITLE]

MEMORANDUM OPINION**I. *History of the Litigation***

This action arises from a complaint for an injunction filed by the Brotherhood of Locomotive Firemen and Enginemen on September 10, 1962. The complaint prayed for a preliminary injunction to order the defendant railroads to operate their trains and switching locomotives with a locomotive fireman or helper.

On January 10, 1963, this Court denied the preliminary injunction in that the extraordinary relief sought was not warranted, absent a full and complete hearing of the case on the merits. Immediately after this Court's denial of the preliminary injunction, the plaintiff informed defendant railroads of its intention to strike for alleged violation of mileage limitations and vacation provisions, commencing on January 13, 1963. The defendants herein filed a complaint for a temporary restraining order on January 12, 1963 (Civil Action No. 123-63) to stay the strike. This Court granted the temporary restraining order, staying the strike until January 22, 1963. This was later extended to February 1, 1963. On January 25, 1963, the Court

Memorandum Opinion of the District Court

ordered that the temporary restraining order would remain in effect until three days after determination by the Court of the Brotherhood's complaint in the instant case.

On February 19, 20 and 21, 1963, a full hearing on the merits of the complaint herein was conducted, and subsequently, exhaustive briefs were submitted by the parties.

Before reaching the subject matter of this complaint, a brief history of the collective bargaining agreement, a portion of which is the subject matter of this dispute, seems appropriate.

II. History of the Agreement

In the late 1930's the Diesel locomotive came into limited use on the American railroad. The first Diesel manpower agreement was concluded in 1937 between the Brotherhood of Locomotive Firemen and Enginemen and a number of Class I railroads. The Southern Railway was not a party to the initial agreement.

In 1943, this agreement was replaced by three regional agreements. The Southern was a party to the Southeastern agreement of May 11, 1944. Section 3 of that agreement reads, in pertinent part, as follows:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;"

By the end of World War II, Diesel power had come into more prominent use and was beginning to replace steam locomotion. At this time the Brotherhood proposed a collective bargaining agreement incorporating the above quoted language. Shortly thereafter, the Carolina and Northwestern Railway, a defendant herein, entered into such an agreement on January 10, 1946.

Memorandum Opinion of the District Court

The other railroads of the country did not agree so readily to this proposal. A strike was called by the Brotherhood, an emergency board was appointed and mediation ensued. Subsequently, on May 17, 1950, the remaining defendants entered into a mediation agreement which incorporated the above quoted language as section 4 of the "Diesel Agreement".

It is undisputed that the provision has remained in effect between the parties since 1950; and, is currently incorporated in the agreement of 1959 at page 152 of the printed version.

During the period 1950 to 1959, the parties hereto operated without substantial difficulty with reference to section 4 of the "Diesel Agreement" entered into in 1950. Then, on August 27, 1959, the General Chairman of the Brotherhood complained to the Southern of a shortage of firemen on the Washington Division and the Atlanta Division South, and requested that sufficient firemen be made available to comply with Section 4 of the "Diesel Agreement". The Railroad admitted that there had been a shortage during the summer months, but the shortage resulted from vacation schedules. Correspondence relating to these shortages continued to be exchanged for several months, until finally on July 19, 1960, the respective positions of the parties were stated at a conference between their representatives. At that time, plaintiff asserted that the carriers must hire additional firemen, regardless of the number on furlough, and the carrier maintained that the "Diesel Agreement" required only that they make work available to those on furlough. Thereafter, the President of the Brotherhood "authorized" a strike for July 26, 1960.

Under this emergency condition, the carrier invoked the services of the Mediation Board and the Brotherhood postponed the threatened strike.

Memorandum Opinion of the District Court

On November 29, 1960, Board conferences were recessed, but mediation resumed in December, 1961. Further conferences were held in May of 1962, and on June 4, 1962, the National Mediation Board terminated its jurisdiction without proffering arbitration.

In addition to the above chronicle of events, further action with relation to section 4 of the "Diesel Agreement" has been pursued by the parties. On November 2, 1959, defendants, together with all of the other Class 1 railroads in the country, filed proposals pursuant to section 6 of the Railway Labor Act (45 U. S. C. 156). These proposals, among other things, would permit the railroads to operate their Diesels without firemen.

On September 7, 1960, the Brotherhood served a Section 6 notice on the carriers, proposing new rules defining the consist of train crews. Subsequently, on September 16, 1960, the Southern Railway, acting independently from the other carriers of the nation, served a new Section 6 notice; and on October 17, 1960, the Southern withdrew from the negotiations of the nationwide Section 6 notice of November 2, 1959.

On May 31, 1962, Southern invoked the services of the National Mediation Board in regard to their Section 6 notice of September 16, 1960. The Board held conferences in August 1962, and recessed mediation. This controversy is still pending before the National Mediation Board.

The final event in this chronology occurred on January 14, 1963, with defendants submitting their controversy over section 4 of the "Diesel Agreement" to the First Division of the National Railroad Adjustment Board, where it is pending.

Memorandum Opinion of the District Court

III. Findings and Conclusions

Essentially, this dispute involves the interpretation of Section 4 of the Mediation Agreement entered into by the parties on May 17, 1950, and incorporated in their agreement of 1959. This agreement is still in effect and reads, in pertinent part, as follows:

"Section 4. A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;"

On or about July 13, 1959, the Southern began operating some trains without firemen or helpers.

Plaintiff contends that this constitutes a violation of Section 2, First; Section 2, Seventh; and Section 6 of the Railway Labor Act (145 U. S. C. A. 152, First, Seventh; 145 U. S. C. A. 156).

Defendants contend that the only issues involved here are issues of contract interpretation and application, the resolution of which lies within the primary administrative jurisdiction of the National Railroad Adjustment Board and are not for determination by the court. The defendant Railroads further allege that the above quoted Section 4 of the agreement requires nothing more than that defendants endeavor to man their trains with firemen currently in the seniority ranks. Or, in other words, if firemen are not available, the railroads may operate without firemen; and, in addition, that the defendants are entitled to reduce the number of firemen on the seniority lists through attrition.

Plaintiff contends that the language of Section 4 requires that a fireman shall be employed on each locomotive.

Memorandum Opinion of the District Court

The Court agrees that this dispute involves a matter of contract interpretation. Further, that this dispute should be properly settled through the offices of the National Railroad Adjustment Board, where it has been pending since January 14, 1963.

However, the determination that this dispute should be settled through the Adjustment Board does not give the parties the authority to change the conditions which existed under the contract, from 1950 through 1959. This is expressly prohibited by Section 6 of the Railway Labor Act, which states:

" . . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or *working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 155 of this title . . .*". (emphasis ours) [45 U. S. C. 156]

In so holding the Court does not rule on the interpretation of Section 4 of the agreement between the parties. This task is for the Adjustment Board in accordance with the procedures of the Act and in order to effectively utilize the expertise possessed by the members of the Board. As the Supreme Court stated in *Slocum v. Delaware*, 1950, 339 U. S. 239, 243, "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak railroad jargon."

This Court is not so equipped. We merely hold that the defendant railroad are not entitled to act indepen-

Memorandum Opinion of the District Court

dently and effect a new interpretation of Section 4 of their agreement and thereby alter working conditions in contravention of Section 6 of the Railway Labor Act.

The change in working conditions to which we refer is not the defendants' refusal to hire additional firemen, but rather their practice of operating locomotives without the services of a fireman or helper. It was the practice of the Railroads to operate locomotives with a fireman or helper from 1950 through 1959, presumably because of their understanding that section 4 of their agreement so required. It is not for this Court to say that this is required, either by the agreement or by custom and practice; neither is it for the Court to say that the language of section 4 requires that additional firemen be hired to replace those lost by attrition. These matters are for the Adjustment Board.

But it is clear to this court that the practice of operating locomotives with a fireman or helper constitutes a "working condition" within the meaning of Section 6 of the Railway Labor Act. The defendants are prohibited from changing this condition until the Adjustment Board resolves the controversy over the language of section 4 of the agreement between the parties.

In *Locomotive Engineers v. M-K-T Railroad Co.*, 1960, 363 U. S. 528, the District Court enjoined a strike by the Brotherhood pending determination of the dispute by the Adjustment Board and imposed conditions to reinstate the *status quo* which existed prior to the issuance of the orders which prompted the strike. The United States Court of Appeals for the Fifth Circuit, in 266 F. 2d 335, sustained the injunction but vacated the conditions imposed by the District Court.

Memorandum Opinion of the District Court

The Supreme Court granted certiorari, 361 U. S. 810, but limited their review to the following question:

"Whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted to the National Railroad Adjustment Board and an injunction against a strike by employees is sought on authority of *Brotherhood of Railroad Trainmen v. Chicago River and Ind. R. R. Co.*, 353 U. S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo . . .".

The Supreme Court upheld the injunction and reinstated the conditions which the District Court had imposed. In ruling that the imposition of these conditions did not go to the merits of the contract dispute, the Court, at 363 U. S. 533, stated:

"Nothing in the record of the proceedings in the District Court suggests that any view on the merits was considered. Instead, the record affirmatively discloses that the district judge was quite aware that it was not his function to construe the contractual provisions upon which the parties relied for their respective positions on the merits. . . .

" . . . It is true that a District Court must make some examination of the nature of the dispute. . . . But this examination of the nature of the dispute is so unlike that which the Adjustment Board will make of the merits of the same dispute, and is for such a

Memorandum Opinion of the District Court

dissimilar purpose that it could not interfere with the later consideration of the grievance by the Adjustment Board."

This is the situation here. Our order will require only a return to the *status quo* until the merits of the dispute are decided by the Board.

The Supreme Court on March 4, 1963, in *Brotherhood of Locomotive Engineers, et al. v. B. & O. Railroad, et al.*, 372 U. S. 284, held that the other railroads of the country are now free to resort to self-help to install their section 6 notices of November 2, 1959 (from which the defendants herein withdrew and subsequently, on September 16, 1960, filed separate section 6 notices). The Supreme Court noted that the railroads involved in that action had concluded mediation and thereby exhausted the statutory procedures. The Southern has not exhausted their statutory remedies as their section 6 notices are still pending before the Mediation Board and their section 4 controversy is before the Adjustment Board.

The issue has been raised as to whether this is a "major" or a "minor" dispute, interpretive terms under the Railway Labor Act. If major, it is generally conceded that the Norris-LaGuardia Act prohibits the issuance of an injunction. *Order of Railroad Telegraphers v. Chicago & N. W. Ry. Co.*, 1960, 362 U. S. 330.

However, in the above cited case, suit was brought to enjoin a threatened strike. In the instant case, the Court is asked to require the carriers to return to the *status quo* pending settlement of the dispute. And, as the Seventh Circuit stated in *Hilbert v. Penn. R. R. Co.*, 1961, 290 F. 2d 881, cert. denied 368 U. S. 900, "nothing in the Norris-

Memorandum Opinion of the District Court

LaGuardia Act prevents a federal court from granting an injunction to require an employer to retain the *status quo*."

In *Trainmen v. Chicago R. & I. R. Co.*, 1957, 353 U. S. 30, the Supreme Court addressed itself to the question of whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. The court, at page 40, held "that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved."

Here, the purpose of the Railway Labor Act would be subverted and the jurisdiction of the Adjustment Board would be avoided if the Court permitted the carrier to submit a Section 6 notice to change the working conditions and, prior thereto, institute a new interpretation of that portion of the agreement which is the subject of the Section 6 notice.

In the *B. & O. Railroad* case, *supra*, this same dispute was termed "major" by the Supreme Court. But in that case both parties had exhausted all of the procedures under the Railway Labor Act. Such is not the situation in the instant case as this dispute is pending before both the National Mediation Board and the National Railroad Adjustment Board. The Court, therefore, finds that the Norris-LaGuardia Act does not prohibit this court from issuing an injunction to require the carriers to return to the *status quo* pending determination of the dispute by the National Railroad Adjustment Board.

This Court is mindful of the fact that the Brotherhood has not demonstrated it will suffer irreparable injury absent the mandatory injunction which the union requests.

Memorandum Opinion of the District Court

Such a showing is normally required in a court of equity when this extraordinary relief is granted. However, much more is involved here than the private rights and duties of individuals, usually the subject of this equitable relief. We are concerned here with eight separate companies, comprising more than seven thousand miles of railroad, including freight and passenger service, the interests of the public throughout the Southeastern United States, and a large and skilled craft of workmen with a long heritage of service to the railroads. In addition, we have the statutory dictates of Congress, which must be observed by the parties. These considerations place a greater burden on the Court and will not permit disposing of the matter simply on the lack of showing of any irreparable injury by the plaintiff.

As the Supreme Court stated in *Virginian Railway Co. v. System Federation No. 40*, 1937, 300 U. S. 515, 551,

"In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation . . .".

And further,

"More is involved than the settlement of a private controversy without appreciable consequence to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. . . . Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to do when only private interests are involved."

Memorandum Opinion of the District Court

In accordance with the foregoing, the Court finds:

1. That it has no jurisdiction over the subject matter of the Section 4 dispute so far as the claims of the respective parties are concerned; that is a matter exclusively within the jurisdiction of the National Railroad Adjustment Board.

2. That a determination of the merits of the dispute over Section 4 of the agreement is now pending before the National Railroad Adjustment Board, the same having been filed on January 14, 1963.

3. That this Court has jurisdiction to issue injunctive relief to maintain the *status quo* during the pendency of the action before the National Railroad Adjustment Board.

The Court therefore will order and direct:

(1) That an injunction issue to return the parties to the *status quo* which existed prior to 1959;

(2) That the defendants will follow the procedures employed in interpretation of section 4 from 1950 to 1959; and further,

(3) That these conditions must be maintained until changed by the determination of the National Railroad Adjustment Board; or

(4) until the agreement is modified in accordance with the Railway Labor Act.

Counsel will submit proper order.

LEONARD P. WALSH
Judge

May 14, 1963

Memorandum Opinion of the District Court

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Order of the District Court

(Filed May 29, 1963)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2881-62

[SAME TITLE]

ORDER

This matter having come on for hearing on February 19, 20, and 21, 1963; and, the Court having issued Findings and Conclusions in a Memorandum Opinion filed May 14, 1963, it is this 29th day of May, 1963,

1. ORDERED, that the parties hereto, namely, the Brotherhood of Locomotive Firemen and Enginemen, Plaintiffs, and the Southern Railway Company, et al., Defendants, shall interpret Section 4 of the Diesel Agreement as it was interpreted prior to July of 1959, and defendants shall operate their locomotives in accordance with said interpretation and the actual operation of locomotives under the agreement during the period prior to July of 1959; and

2. ORDERED, that the defendants herein shall maintain the *status quo* with respect to their operation of locomotives and the use of firemen thereon in the application of Section 4 of the Diesel Agreement, by making available sufficient firemen to comply with said Section 4, and by following the same procedures employed by defendants and maintaining the same working conditions as were maintained by the defendants in the employment and application of said Section 4 during the period 1950 to 1959; and

Order of the District Court

3. IT IS FURTHER ORDERED, that the defendants shall have a period of thirty (30) days from the date of this Order in which to notify firemen or helpers on furlough status of employment on defendants' lines, or to hire new firemen or helpers, and to operate their lines in accordance with Section 4 of the Diesel Agreement as interpreted prior to July of 1959.

4. IT IS FURTHER ORDERED, that this Order shall remain in effect until the National Railroad Adjustment Board makes a determination in the case submitted to it by the defendants on January 14, 1963; or, until the agreement between the parties is modified in accordance with the Railway Labor Act.

LEONARD P. WALSH
Judge

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**Statement of Appellants as to
Contents of Joint Appendix**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17891

[SAME TITLE]

To: Nathan J. Paulson, Esq.
Clerk, United States Court of Appeals
Washington, D. C.

Pursuant to Rule 16(b) of the Rules of the United States Court of Appeals for the District of Columbia, come now the appellants, within ten days after the record on appeal was filed in this Court, and considering the whole of it not necessary to be considered by the Court, file, together with an affidavit of service on counsel for the appellee, this request that only the following designated portions of the record be printed in the Joint Appendix:

1. The Complaint;
2. The Answer, omitting exhibits thereto;
3. The Amended Answer, omitting exhibits "A" and "C" thereto and, with respect to exhibit "B", omitting the schedule annexed thereto;
4. The Amendments to Complaint;
5. The Answer to Amendments to Complaint;
6. The Transcript of the Hearing held on February 19, 20 and 21, 1963, before the District Court;

*Statement of Appellants as to
Contents of Joint Appendix*

7. Defendants' exhibits 1-20; 44-67, omitting exhibits "A" and "B" to exhibit 47; 69-71;

8. Plaintiff's exhibit 2, omitting all pages but page 1 and pages 150 (from line 13 thereof) through page 156 (line 9); exhibit 3, omitting pages 1, 5-10 and page 11 (lines 18 through 45); and exhibits 4, 5, 6, 7, 8, 9, 11, 13, 14 and 15;

9. Memorandum Opinion of the District Court filed May 14, 1963;

10. Order of the District Court filed May 29, 1963; and

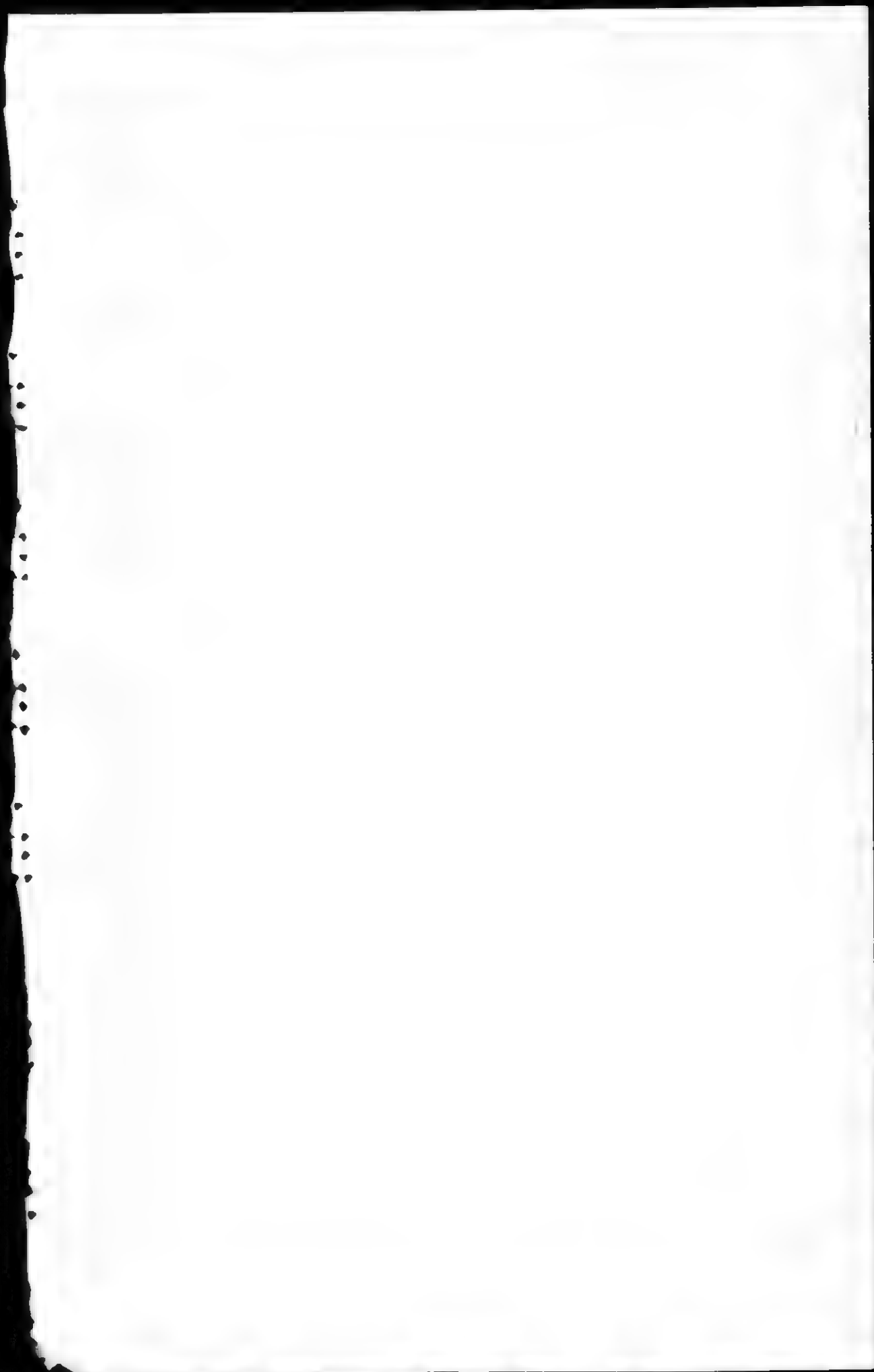
11. This statement by appellants as to contents of the Joint Appendix.

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BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17891

SOUTHERN RAILWAY COMPANY, et al.,

Appellants,

—v.—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
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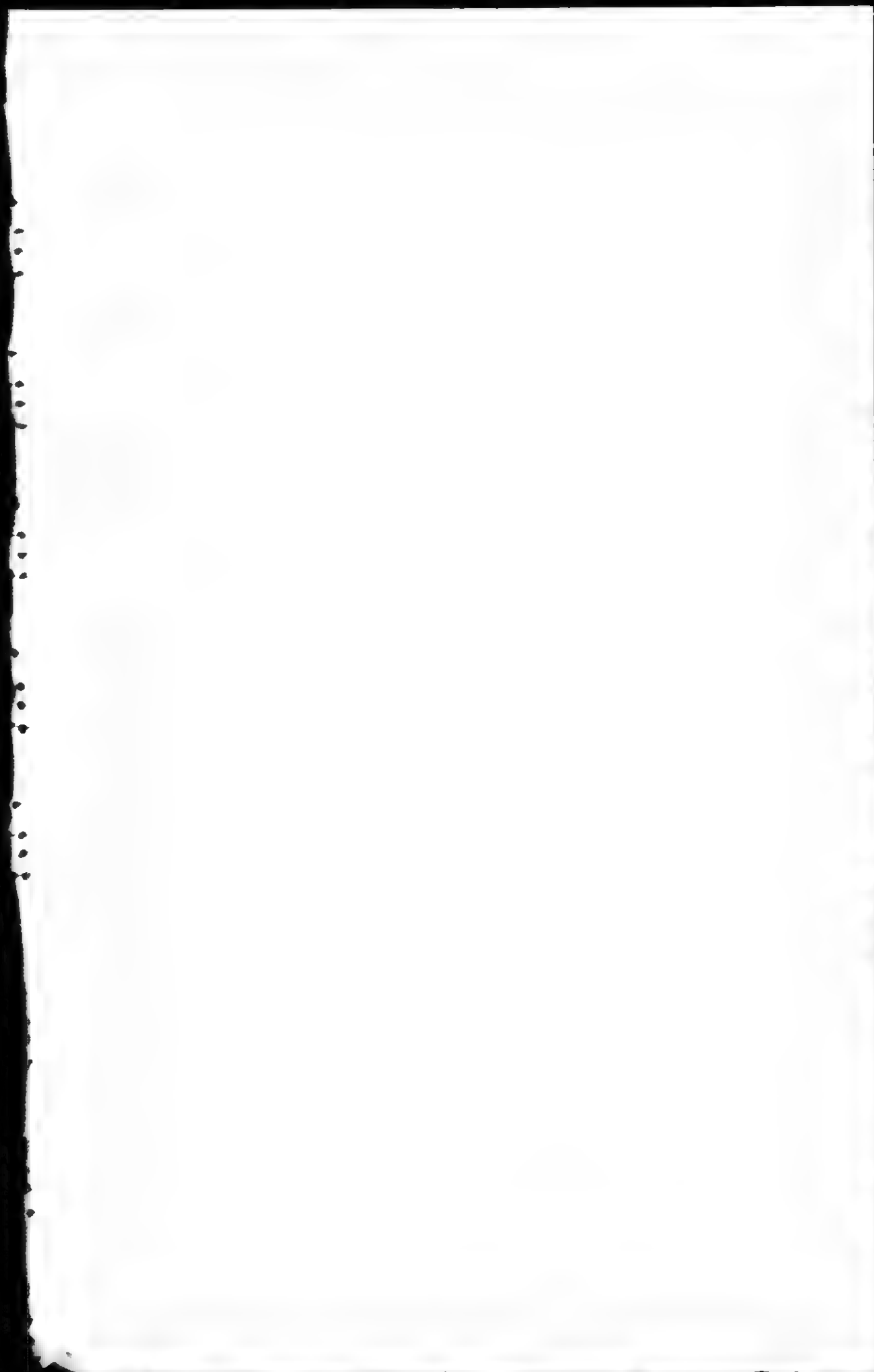
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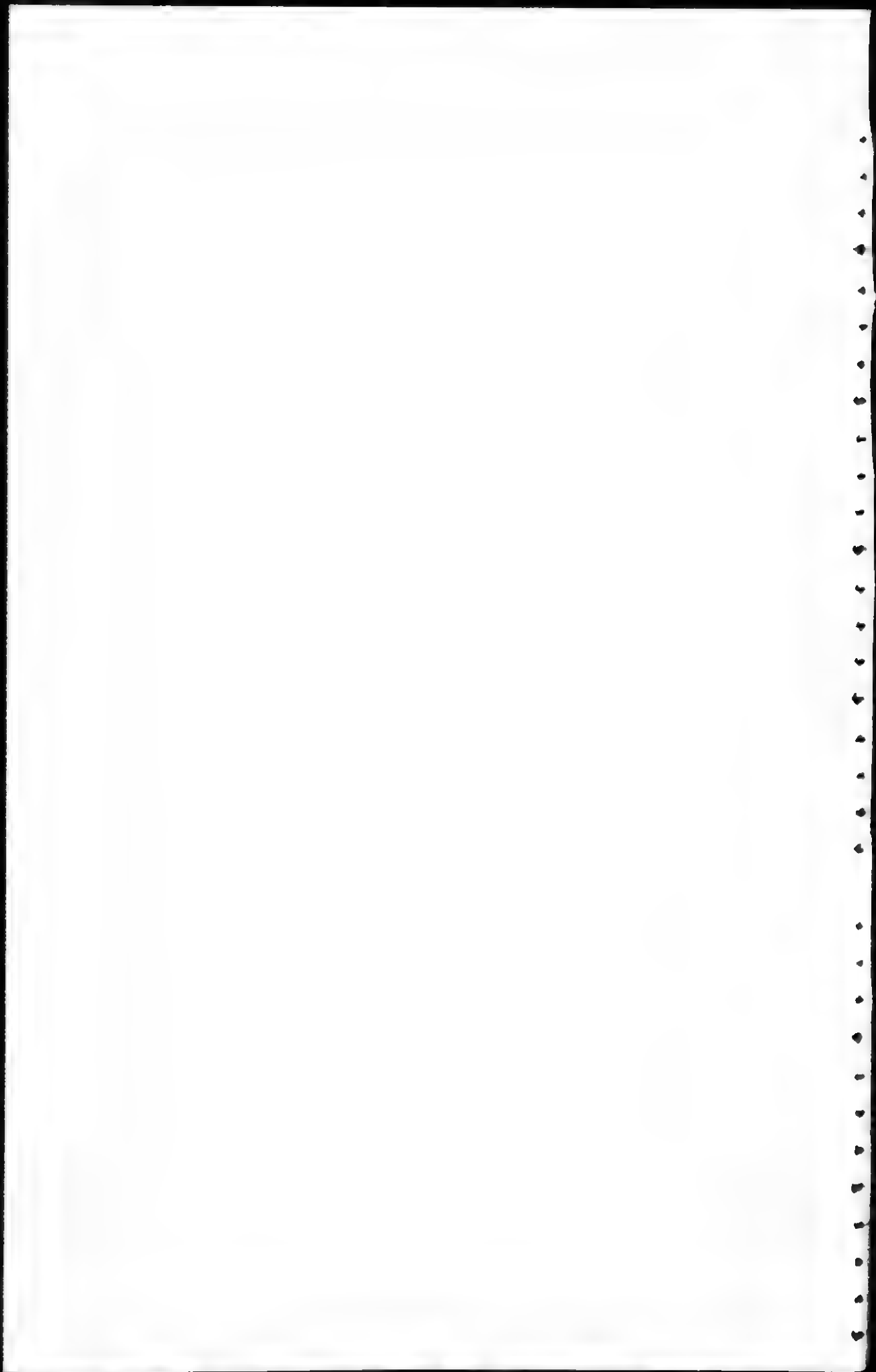


Statement of Questions Presented

1. Did the District Court have power, in this plenary action brought by a labor organization, to issue a mandatory injunction, admittedly not in aid of its own jurisdiction, but "to maintain the status quo" during the pendency of proceedings before the National Railroad Adjustment Board?

2. Should the mandatory injunction be reversed because (a) neither the appellee nor any of appellants' firemen whom it represents would suffer irreparable injury absent said injunction, whereas the injunction inflicts immediate, irreparable and continuing injury on appellants; (b) there is no evidence to support the court's conclusion that the public interest would be adversely affected by denial of a mandatory injunction; and (c) the unprecedented so-called "status quo" mandate reaches back to a status that had not existed for more than three years before the commencement of the action and is devoid of equity?

3. Does the equitable doctrine of "unclean hands," recognized and codified in Section 8 of the Norris-LaGuardia Act, 29 U. S. C. §108, require reversal of the order?



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17891

SOUTHERN RAILWAY COMPANY,
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY,
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,
THE NEW ORLEANS AND NORTHEASTERN RAILROAD
COMPANY,
THE NEW ORLEANS TERMINAL COMPANY,
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,
ST. JOHNS RIVER TERMINAL COMPANY,
CAROLINA AND NORTHWESTERN RAILWAY COMPANY,

Appellants,

—v.—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,

Appellee.

BRIEF FOR APPELLANTS

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* Cases chiefly relied upon are marked by asterisks.

Jurisdictional Statement

Appellants (hereafter "Southern"), together with other railway companies which collectively comprise the Southern Railway System, maintain their principal offices in Washington, D. C. and are "carriers" as defined by the Railway Labor Act, 45 U. S. C. §151 (Jt. A. 2, 7, 12). The complaint alleged violations of the Railway Labor Act by Southern (Jt. A. 6-7, 24-25).

Appellee (hereafter the "Brotherhood") contended that the District Court had jurisdiction under 28 U. S. C. §1337, and 11 D. C. Code §306. (See transcript of oral argument on the Brotherhood's motion for a preliminary injunction, at p. 8.)

Jurisdiction to review the order entered below is premised on 28 U. S. C. §§1291 and 1294(1).

Statement of the Case

For over four years (Jt. A. 163-165), a dispute has raged between Southern and the Brotherhood over the interpretation and application of Section 4 of the Diesel Agreement which in pertinent part provides:

*"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives * * *." (Jt. A. 416; emphasis added.)*

Although Southern hired some new firemen between May 17, 1950 and the end of 1958, and hired one fireman in 1959 (Jt. A. 152, 263), none have been hired since. As a result,

attrition at the rate of about four percent a year has occurred (Jt. A. 134) and an increasing number of trains has been run without firemen. This did not, in Southern's view, violate the contract because Section 4 limits Southern's obligation to employ and use firemen to those already within "the seniority ranks of the firemen." The agreement thus does not require the hiring of new employees as firemen (see Jt. A. 35-38, 46, 49).

During this extended period, the Brotherhood took a contrary position and treated the entire dispute as a contractual controversy—a "minor" dispute without statutory overtones (Jt. A. 253-256, 267-287, 314, 318-322, 341-343, 374-383, 385-407). On September 10, 1962, however, the Brotherhood brought this action (Jt. 464). It claimed that Southern's application of Section 4 amounted to a continuing breach of contract dating back to July of 1959 *and* that this purported breach was also an independent violation of Section 2, First and Section 2, Seventh of the Railway Labor Act, 45 U. S. C. §152, First and Seventh (Jt. A. 5-6, par. 11).

Section 2, Seventh in pertinent part provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in Section 156 of this title." (Emphasis added.)

Southern argued below (Jt. A. 33-44) that the obligation to use firemen on all diesel locomotives and, therefore, to employ new firemen was *not*, regardless of prior practice, *embodied in the agreement* with the Brotherhood. Southern further asserted that the instant action concerned only a dispute over the interpretation and application of the provisions of Section 4 and that such dispute fell within

the primary and exclusive administrative jurisdiction of the National Railroad Adjustment Board where it was pending, having been submitted to that agency by Southern on January 14, 1963 (*ibid.*; see point I, A *infra*).

In response to this, after its motion for a preliminary injunction had been denied and on the eve of trial, the Brotherhood amended its complaint (Jt. A. 22-25) to insert a claim to the effect that Southern's refusal to hire and use new firemen was an implementation of a bargaining proposal (Jt. A. 434-436) served by Southern pursuant to Section 6 of the Railway Labor Act, 45 U. S. C. §156, on September 16, 1960—long after the underlying contractual dispute concerning non-use of firemen had arisen. This, the Brotherhood asserted, violated Sections 5, First and 6 of the Railway Labor Act because the National Mediation Board had not closed its file on the proposal and the requisite statutory waiting periods had not expired (Jt. A. 24-25).

This proposal, however, had actually been served in response to an earlier notice served by the Brotherhood (Jt. A. 26-27, 431-436) and, in any event, was nothing more than an attempt by Southern to moot, via a bargained settlement, the pre-existing contractual dispute over the meaning of Section 4 of the Diesel Agreement. It could not and did not make Southern's pre-existing course of conduct under its contract unlawful *nunc pro tunc* (see Point I, B, *infra* and Jt. A. 210, 321-322).

On May 14, 1963, the District Court, after trial, found:

"1. That it has no jurisdiction over the subject matter of the Section 4 dispute so far as the claims of the respective parties are concerned; that is a matter exclusively within the jurisdiction of the National Railroad Adjustment Board.

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2. That a determination of the merits of the dispute over Section 4 of the agreement is now pending before the National Railroad Adjustment Board, the same having been filed on January 14, 1963.

3. That this Court has jurisdiction to issue injunctive relief to maintain the *status quo* during the pendency of the action before the National Railroad Adjustment Board" (Jt. A. 475).

Although the court found "that the Brotherhood [had] not demonstrated it will suffer irreparable injury absent the mandatory injunction which . . . [it] request[ed]" (Jt. A. 473), and though this action was not commenced until September 10, 1962, it nevertheless announced that it would order:

"(1) That an injunction issue to return the parties to the *status quo* which existed prior to 1959;

(2) That the defendants will follow the procedures employed in interpretation of section 4 from 1950 to 1959; and further,

(3) That these conditions must be maintained until changed by the determination of the National Railroad Adjustment Board; or

(4) until the agreement is modified in accordance with the Railway Labor Act." (Jt. A. 475; emphasis added.)

Such an injunction was issued on May 29, 1963, and became operative June 29, 1963 (Jt. A. 477-478). Southern has thus been required to employ many new firemen.

Statement of Facts

This controversy first arose in June 1958, when the Brotherhood complained of a "shortage of firemen" at four separate locations (Jt. A. 163-165). Before the end of that month, these complaints had been processed through the first two steps of the grievance procedure, but were thereafter allowed to remain dormant for over a year (*ibid.*).*

On August 27, 1959, the Brotherhood insisted that "sufficient firemen by [sic] made available to comply with Section 4 of the Diesel Agreement * * *" (Jt. A. 341). On September 15, 1959, and again on October 2, 1959, Southern advised the Brotherhood that it did not intend to employ additional firemen (Jt. A. 268-269, 295-297).

Events Prior to the Strike Threat of 1960

On March 10, 1960, terming the situation "serious", the Brotherhood demanded an immediate conference with Southern because a train had been operated the previous day without a fireman (Jt. A. 342). Adhering to the position "that the Agreement [was] * * * not being violated," Southern nevertheless agreed to meet with the Brotherhood on March 24, 1960 (Jt. A. 343). This meeting resulted in a revision of Article 26(g) of the contract which became effective April 22, 1960 (Jt. A. 302-304, 405-407).

By that amendment, a man furloughed in his home seniority district could retain his seniority on that district while standing for service in another district even if he were subsequently called for service on his home district

* The grievance procedure which leads ultimately to the Adjustment Board or to the Special Diesel Committee (Jt. A. 420-421) is set forth in detail in Article 32 of the contract (P. Ex. 2 at pp. 73-5).

(Jt. A. 270-271, 405-407). Southern thus sought to induce firemen furloughed on their home districts to work in districts where there were few or no firemen furloughed (*ibid.*). The Brotherhood, nevertheless, continued to insist that new firemen be hired (Jt. A. 271). On May 13, 1960, a conference was held in Washington to discuss what the Brotherhood called "violation[s] of Section 4 of the Diesel Agreement and the general problem of the insufficient number of firemen at certain points on the Southern System" (Jt. A. 271). At this conference, Southern reiterated that

"1. Everything possible was being done to get furloughed firemen to return to work from other divisions.

2. *No new firemen would be employed.*

3. *No service would be tied up when firemen were not available.*" (Jt. A. 271; emphasis added.)

Thus, by May 13, 1960, and even before then, the conflicting positions of the parties with respect to the meaning of Section 4 of the Diesel Agreement had become fixed.

The July 1960 Threatened Strike

Although neither side treated the dispute as anything but a "minor" dispute—a matter of conflicting contractual interpretations—the Brotherhood did not submit it to the National Railroad Adjustment Board for compulsory arbitration. Instead, it prepared for strike action (Jt. A. 301, 312).

On July 21, 1960, it set a strike for July 26, 1960, "account carrier refusing to hire firemen in order that Diesel Agreement requiring employment of firemen on diesels can be fulfilled" (Jt. A. 314). Southern asked the National Mediation Board to intervene under the labor emergency

provisions of Section 5 of the Railway Labor Act, 45 U. S. C. §155. The Board did so, docketing the matter as Case E-240 and the strike was postponed (Jt. A. 315-317).

The Brotherhood's Proposal of September 7, 1960 and Southern's Reply of September 16, 1960

On September 7, 1960, long after the dispute over the meaning of Section 4 had arisen and in opposition to the national movement for the complete and immediate elimination of firemen, the Brotherhood served a proposal pursuant to Section 6 of the Railway Labor Act which, if accepted, would have required that new firemen be hired for use on all diesel locomotives (Jt. A. 431-433, par. 2).*

On September 16, 1960, Southern responded with a counter-proposal which would have written into the contract its pre-existing interpretation of Section 4, an interpretation which protected the rights of all firemen in the Brotherhood's seniority ranks on Southern's lines, but precluded new hires (Jt. A. 434-436).

The adoption of either of these proposals would have ended the pre-existing dispute over the meaning of Section 4. But the service of these notices did not settle that two-year old controversy; it merely opened the way for its possible resolution across the bargaining table.

A meeting was held on October 10, 1960, but no agreement was reached (Jt. A. 218-219, 324-325, 409). No other meeting was held until late August 1962, after Southern

* On November 2, 1959, all Class I railroads, including Southern, served a proposal pursuant to Section 6 of the Railway Labor Act to eliminate forthwith the positions of all firemen in the seniority ranks of the Brotherhood (Jt. A. 430). This national notice, which called for the complete and immediate elimination of all firemen, played no part in the pre-existing contractual controversy between these parties over the meaning of Section 4 (Jt. A. 210, 213, 321-322). In fact, Southern ultimately withdrew from the national movement in October of 1960 (Jt. A. 437).

had invoked the services of the National Mediation Board (Jt. A. 210).

Significantly, the Brotherhood's own chronology of the events in connection with this dispute makes no mention of the service of either of these proposals; nor is there a mention of the October 10, 1960 discussions (Jt. A. 272). This "chronology" is a plain admission that the Brotherhood, over a period of more than three years—and consistently prior to the institution of this action—treated its dispute with Southern solely as a claimed contract violation, never as an implementation of Southern's proposal of September 16, 1960 (see also, Jt. A. 267-294).

This was admitted on cross examination by R. L. McCollum,* the General Chairman of the Brotherhood on Southern's lines:

"Q. You had a lot of special conversation and such with Southern you say you did not have with other railroads? A. Not involved in the Section 6.

"Q. *But you were having quite a scrap all through this!* A. *Not with the Section 6 notice.*" (Emphasis added; Jt. A. 210.)

While These Proposals Lay Dormant, the Dispute Over the Meaning of Section 4 Continued Unabated

Following the intervention of the National Mediation Board in July of 1960, the contractual dispute continued unresolved despite the efforts of the National Mediation Board in Case E-240, over a period of almost two years, to resolve the differences between the parties.

On June 4, 1962, the Mediation Board, unable to secure a resolution of the contractual dispute, closed its file on

* This name is spelled correctly here, but incorrectly in the Transcript, and thus in the Joint Appendix.

Case E-240, without proffer of arbitration (Jt. A. 195, 408). The absence of such a proffer is conclusive evidence that the Mediation Board regarded the controversy over Section 4—the subject of Case E-240—as a “minor” dispute exclusively referable to the Adjustment Board. Otherwise, 45 U. S. C. §155 would have required such a proffer.

The Brotherhood also regarded this controversy as a “minor” dispute. All its correspondence during this period speaks in terms of violation of contract, not statute (Jt. A. 255, 318-320, 374-382). The record demonstrates that even in its own intra-union dealings the Brotherhood recognized that the controversy over Section 4 was a “minor” dispute.

It was near the close of mediation in Case E-240, late in May of 1962, that the President of the Brotherhood wrote to his General Chairman on Southern's lines in pertinent part as follows:

“While considerable merit may be contained in your proposal to institute strike action, *care must be exercised not to lose sight of the injunctive processes of the courts under the ‘minor grievances’ doctrine of the United States Supreme Court in the Chicago River & Indiana Ry case.* Since the National Work Rules dispute is rapidly reaching a climax, question arises as to the wisdom of seeking remedy on the Southern Ry through this method at the present time despite the apparent justification for same. In evaluating the situation from a procedural standpoint, strike action premised on the assumption that the carrier would seek injunctive relief might possibly provide a solution to the problem.

“Theoretically, petitioners for injunctive relief must come into the courts with ‘clean hands’. While it would not be too difficult for the Southern Ry to obtain a

temporary order, proof must be submitted to the courts before such an order can be made permanent showing the petitioner as defenseless against irreparable loss and or damage if the other party is not restrained. In light of the record presently established on your property, some question arises as to the ability of the Southern Railway to convince the courts that they have 'clean hands'." (Jt. A. 321-322; emphasis added.)

The President of the Brotherhood thus explicitly recognized the controversy as a "minor" dispute in which an injunction would issue against the proposed strike unless Southern could be shown to have acted with "unclean hands". (In the case at bar, however, it is the Brotherhood that is suing and belatedly claiming a statutory violation in the very controversy which its own President had warned was a "minor" dispute.)

Southern Invokes Mediation on Its September 16, 1960 Proposal

On May 31, 1962, Southern invoked mediation on its September 1960 proposal (Jt. A. 146-147, 439-440). In the ensuing months, however, the Brotherhood sought to thwart expeditious disposition of this proposal which could have resolved, by rendering moot, the pre-existing contractual dispute (Jt. A. 323-326, 384). This wilful refusal to negotiate—totally ignored by the Court below—became obvious on August 13, 1962, when the Brotherhood's General Chairman refused to meet with Southern to work out a revision of the disputed contract, unless the carrier first acceded to the Brotherhood's interpretation of that agreement. The refusal was unequivocal:

"... Why negotiate agreement when you lack honesty, decency and integrity [to] fulfill present agree-

ment? Present time can be better spent preparing strike or court action" (Jt. A. 327).

In spite of the Brotherhood's refusal to bargain in good faith, the Mediation Board on August 14, 1962 docketed the Brotherhood's proposal of September 7, 1960 and Southern's proposal of September 16, 1960 for mediation as Case Nos. A-6754 and 6766 (Jt. A. 328-330). These proposals were given docket numbers separate and distinct from the one (E-240) assigned to mediation of the controversy over the meaning of Section 4—the mediation in which the file had been closed on May 31, 1962 (Jt. A. 328-330, 408). Abortive sessions were held in Case Nos. A-6754 and 6766 between August 21 and 30, 1962, after which the Board recessed mediation, but did not close its files (Jt. A. 138-139).

The Brotherhood Shifts Its Ground to a Claim of Statutory Violation and Seeks Judicial Relief

Through all of this period—from June 1958 to August 1962, and even beyond—the Brotherhood in its correspondence with Southern persistently treated the dispute over Section 4 as contractual and not statutory (see Jt. A. 251, 321-322, 383-398, 400-404). It was not until September 10, 1962, when this action was commenced, that a violation of the Railway Labor Act was first claimed.

The Strike Threatened on January 10, 1963

On November 15, 1962, the Brotherhood moved for a preliminary injunction which the District Court denied on January 10, 1963 (Jt. A. 464). Even before then, however, the Brotherhood had resolved to institute strike action; and, with its motion pending, set a strike to enforce its position on the Diesel Agreement, i.e., to compel Southern to hire and use new firemen (Jt. A. 331-340, 411-413).

On November 12, 1962, the Brotherhood's General Chairman on Southern's lines wrote to all his local chairmen and recording secretaries (Jt. A. 411-413) informing them that strike action would be authorized with respect to Southern's refusal to employ new firemen. This letter set forth the text of Section 4 and concluded:

"If we are unable to reach an agreement with Management, we will attempt, through our Attorneys, to speed up court action. Should both of these efforts fail, we will be forced to authorize strike action" (Jt. A. 412).

However, on November 15, 1962, a Vice President of the Brotherhood, Jennings, wrote to his President telling him that on the basis of advice received from counsel:

"In dealing with this situation and keeping in mind the necessity of proceeding in this action without becoming involved with the present litigation involving Sec. 4 of the Diesel Agreement, it would appear necessary that we predicate all of our actions on violation of other Agreements in effect on the Southern System" (Jt. A. 331).

Following this, the Brotherhood's General Chairman on Southern fell into line and dropped all mention of Section 4 from his internal correspondence setting up the mechanics of the stoppage (see Jt. A. 333-340). This strike, its purpose thus obscured, was called on January 10, 1963, for January 13th, only to be enjoined by the District Court for the District of Columbia in Civil Action 123-63 (Jt. A. 464). On the next day, January 14, 1963, Southern submitted the controversy over Section 4 to the First Division of the National Railroad Adjustment Board where it is pending determination (Jt. A. 344-371, 467, 469).

Statutes Involved

(See Statutory Appendix)

Statements of Points

1. The subject matter of this controversy—the root issue concerning the meaning of Section 4—falls within the exclusive and primary administrative jurisdiction of the National Railroad Adjustment Board.

2. The District Court was without power, in this plenary action brought by a labor organization, to issue a mandatory injunction, admittedly not in aid of its own jurisdiction, but “to maintain the status quo” during the pendency of the proceedings before the National Railroad Adjustment Board.

3. In any event, the order should be reversed because: (a) neither the Brotherhood nor any of the firemen would suffer irreparable injury absent the injunction entered below—whereas the injunction inflicts immediate, irreparable and continuous injury on Southern; (b) there is no evidence to support the court’s conclusion that the public interest would be adversely affected by denial of a mandatory injunction; and (c) the unprecedented so-called “status quo” mandate reaches back to a status that had not existed for more than three years before the commencement of the action and is devoid of equity.

4. The equitable doctrine of “unclean hands,” recognized and codified in Section 8 of the Norris-LaGuardia Act, 29 U. S. C. §108, requires reversal of the order.

Summary of Argument

Whether all of Southern's trains must be run with firemen, thus necessitating new hires is a question of contract, not statute. The Railway Labor Act does not specify terms and conditions of employment; these are subjects for collective bargaining agreements negotiated by the parties in accordance with the procedures set forth in the statute.

To the National Railroad Adjustment Board, Congress has given primary and exclusive jurisdiction to interpret and apply these collective bargaining agreements. The court below recognized this and ruled that it did not have the jurisdiction to determine whether Southern was required by its contract to hire new firemen. This should have disposed of the case. That superimposed upon the Brotherhood's claims of contract breach were charges of statutory violations was of no legal consequence (see Point I, *infra*, at pp. 17-21).

The court, however, assumed that Southern's refusal to employ new hires to run all of its trains with firemen was a change in working conditions which violated the Railway Labor Act—or, at least, presumptively did so unless the Adjustment Board ruled to the contrary. But this conclusion totally ignored the explicit language of Section 2, Seventh of the Act which affords protection only to those working conditions "embodied in agreements".

This issue of contractual embodiment, although raised under a charge of statutory violation is, under the decided cases, nonetheless for the Adjustment Board. As the courts have recognized, a contrary holding would go far toward eliminating the usefulness of that body which was established to administer what the Supreme Court has termed "a mandatory exclusive and comprehensive system" for

determining disputes the nexus of which lies in the meaning of collective bargaining agreements (see Point I, *infra*, at pp. 21-23).

The result reached below is further based on the mistaken assumption that Southern's proposal of September 16, 1960 operated retroactively to deprive Southern of its previously asserted contractual right to refuse to employ new hires. In Point I, B, *infra*, at pp. 23-27, we demonstrate that this conclusion is without support in fact or law.

Apparently based on these misconceptions, and while admitting lack of jurisdiction to entertain the "minor" dispute, the District Court issued a mandatory injunction designed to maintain an alleged "status quo" pending determination by the Adjustment Board. We submit that the court had neither the authority nor the jurisdiction to do so. Section 3, First of the Railway Labor Act sets forth a comprehensive scheme of compulsory arbitration which nowhere provides for the issuance of such mandates. It is clear from the legislative history of the Railway Labor Act that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate (see Point II, A, *infra*, at pp. 27-30).

The issuance of the mandate, in any event, contravenes the Norris-LaGuardia Act. This case clearly involves a labor dispute within the meaning of that statute—the broad proscriptions of which extend to precisely the type of order here entered (see Point II, B, *infra*, at pp. 31-34).

Furthermore, this order, which is mandatory in character, restored a status quo which had not existed for more than three years before the Brotherhood brought its action. No evidence was adduced to establish that anyone would have been irreparably injured had the mandate not issued,

nor is this void filled by the court's expressed concern for an imagined public interest. There is no evidence to show even the slightest damage to any interest Congress has sought to protect. This concern, in short, is nothing more than a subjective appraisal by the court below (see Point III, A and B, *infra*, at pp. 34-38).

The mandate under review is anything but a "status quo" order for it restores conditions as they existed not at the time the action was commenced, but prior to 1959—more than three years before this suit was brought. In issuing it, the court below disregarded the fact that the Brotherhood slept on any judicial rights or remedies it may have had for over three years, and on its administrative remedies for even longer than that. Its order is thus devoid of equity (see Point III, C, *infra*, at pp. 38-39).

Finally, the defense of "unclean hands", as recognized and codified in Section 8 of the Norris-LaGuardia Act, provides an independently dispositive basis for reversal. This defense, applicable regardless of the merits of the Brotherhood's case, was totally ignored below. It is based on the Brotherhood's threatened strikes of July 1960 and January 1963, its failure to exhaust its administrative remedies and its refusal to negotiate in good faith. Each of these facts, standing alone, was sufficient to deprive the Brotherhood of any basis for the injunctive relief it was granted (see Point IV, *infra*, at pp. 40-45).

ARGUMENT

POINT I

The subject matter of this controversy—the root issue concerning the meaning of Section 4—falls within the exclusive primary administrative jurisdiction of the National Railroad Adjustment Board.

A long line of Supreme Court decisions has settled the proposition that the administrative jurisdiction of the Adjustment Board is both primary and exclusive. That proposition, which is dispositive of this appeal, was most recently reasserted by the Court in *Locomotive Engineers v. Louisville & N. R. Co.*, 373 U. S. 33, 38 (1963):

“The several decisions of this Court interpreting §3 First have made it clear that this statutory grievance procedure is a *mandatory, exclusive, and comprehensive system* for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board, with or without the consent of the other, has been firmly established. *Brotherhood of R. R. Trainmen v. Chicago R. & I. R. Co.*, 353 U. S., at 34. And the other party may not defeat this right by resorting to some other forum. Thus, in *Order of Ry. Conductors of America v. Southern R. Co.*, 339 U. S. 255 the Court held that a state court could not take jurisdiction over an employer’s declaratory judgment action concerning an employee grievance subject to §3 First, because, ‘if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by §3 First (i) . . . which provides that after negotiations have

failed "either party" may refer the dispute to the appropriate division of the Adjustment Board.' *id.*, at 256-257. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239. Similarly, an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement. *Pennsylvania R. Co. v. Day*, 360 U. S. 548, 552-553. A corollary of this view has been the principle that the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute. In *Union Pacific R. Co. v. Price*, 350 U. S. 601 the Court held that an employee could not resort to a common law action for wrongful discharge after the same claim had been rejected on the merits in a proceeding before the Adjustment Board. The decision in that case was based upon the conclusion that, *when invoked, the remedies provided for in §3 First were intended by Congress to be the complete and final means for settling minor disputes.*" (Emphasis added.)

In the case at bar the court found "that this dispute involves a matter of contract interpretation" which "should be properly settled through the offices of the National Railroad Adjustment Board where it has been pending since January 14, 1963" (Jt. A. 469). This conclusion should have disposed of this case as a matter of law on grounds of administrative exclusivity.

Such a disposition would have been in accord with the square holding of *International Ass'n of Machinists v. Eastern Airlines, Inc.*, Slip Op. No. 20,115, 53 LRRM 2795, 47 CCH Labor Cases para. 18,370 (5th Cir. July 18, 1963). In Count 1 of its complaint in that action the IAM had claimed that Eastern had violated its contract and

Sections 2 and 6 of the Railway Labor Act "by attempting unilaterally to cancel earned vacations of its employees" Count 2 involved a congruent claim grounded upon a purported unilateral extension of the work week. Count 3 had incorporated Counts 1 and 2 and alleged in part that Eastern had deliberately tried to destroy the IAM as a bargaining agent in violation of both its collective bargaining agreement *and* the Railway Labor Act.

The trial court granted Eastern's motion to dismiss, concluding "that the complaint had as its purpose injunctive relief against alleged violations of the collective bargaining agreement and that the alleged violations . . . were 'minor disputes' or grievances and were subject to the exclusive jurisdiction of the . . . Board of Adjustment" (Slip Op. at pp. 3-4).

The Fifth Circuit unanimously affirmed, while recognizing that "*the main purpose of the litigation was to obtain injunctive relief restoring the parties to the status quo.*"* In so doing, it rejected the union's contention that its charges of statutory violation—assertions which amounted to nothing more than claims of contract violation—stated a cause of action within the District Court's jurisdiction. The court said (Slip Op. at pp. 5, 8):

" The fact that the matters complained of are alleged to constitute violations of the Act as well as violations of the agreement does not oust the Adjustment Board of its exclusive jurisdiction. *Alabaugh v. B. & O. R.R.*, 222 F. 2d 861 (1955), *cert. denied*, 350 U. S. 839 (1955)."

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* Emphasis added.

“ The Adjustment Board cannot be by-passed; its jurisdiction cannot be thwarted in minor disputes in grievance cases by the bald allegation that the violations of the agreement are ‘but a part of a deliberate scheme’ designed to eliminate the union as sole bargaining agent. A contrary holding would go far toward eliminating the usefulness of the Adjustment Board.”

In *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384 (5th Cir. 1952), *cert. denied*, 345 U. S. 908 (1953), a case premised on a theory (Jt. A. 5-6) here being advanced by the Brotherhood, the court affirmed dismissal of an action brought by that same Brotherhood, saying (pp. 385-6):

“ Because of its peculiar composition and special equipment to exercise such functions, Congress conferred on the Adjustment Board jurisdiction to hold hearings, make findings, and enter awards, in all disputes between carriers and their employees growing out of grievances or out of the interpretation or application of agreements concerning rates of pay or working conditions. 45 U. S. C. A. §153. Precedents established by it have provided a degree of uniformity for interpretation of collective agreements. Its jurisdiction over the making of collective agreements and over grievances arising under existing agreements has been held to be exclusive. Accordingly, we think the judgment appealed from should be affirmed”

“Only after the Adjustment Board has acted can it definitely appear that relief by the courts is necessary to insure compliance with the statute. *Order of Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318.” (Emphasis added.)

In the case at bar the Brotherhood has made charges of contract violations which it asserts are also independent violations of the Railway Labor Act (Jt. A. 5-6). Here, as in the *Eastern Airlines* and *Central of Georgia* cases, the charges require dismissal for want of jurisdiction.

This would represent a correct application of the rule first laid down in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 565-7 (1946): If the pleadings raise an issue requiring interpretation of a collective bargaining agreement covering employment in the railroad industry, the courts must yield jurisdiction to the Board. See also, e.g., *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 242-4 (1950); *Pennsylvania R. Co. v. Day*, 360 U. S. 548 (1959); *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (7th Cir.), cert. denied, 368 U. S. 900 (1961).

A. Only Working Conditions "Embodied in Agreements" are protected by the Railway Labor Act. Whether a Contractual Embodiment Exists Is, in the First Instance, for the Adjustment Board and Not for the Courts.

The District Court's failure to apply the principles set forth above and to dismiss for want of jurisdiction stemmed in part from its erroneous assumption that Southern's refusal to employ new hires so as to run all of its trains with firemen was a change in working conditions in violation of the Railway Labor Act (Jt. A. 469-470). The court failed to recognize that both Section 6 of the Railway Labor Act and Section 2, Seventh, which implements Section 6, apply only to working conditions "*embodied in agreements*". A purported working condition without contractual embodiment is not protected by the statute.

As the Supreme Court said in *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 400 (1942):

“ The crucial §6 is phrased so as to leave no doubt that only agreements reached after collective bargaining were covered. Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act, and §6 was likewise then amended by adding ‘in agreements’ to that section’s former requirement of notice of ‘an intended change affecting rates of pay, rules or working conditions.’ ”

In the case at bar, the question whether the working condition in issue is embodied in the agreement is pending before the Adjustment Board. This determination should have been made, in the first instance, by that agency acting under Section 3, First of the Act and not by the court. It is “[o]nly after the Adjustment Board has acted” that judicial process may be invoked “to insure compliance with the statute.” *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384, 385-6 (5th Cir. 1952), *cert. denied*, 345 U. S. 908 (1953). “A contrary holding would go far in eliminating the usefulness of the Adjustment Board.” *International Ass’n of Machinists v. Eastern Airlines, Inc.*, Slip Op. No. 20,115, 53 LRRM 2795, 47 CCH Labor Cases para. 18,370 (5th Cir. July 18, 1963).

This, too, was the purport of *Flight Engineers International Ass’n, WES Chapter v. Western Airlines, Inc.* (not officially reported), 48 LRRM 2487, 2489-91, 43 CCH Labor Cases para. 17,064 (S. D. Cal. 1961).^{*} In that case the court ruled that whether a pre-existing practice, *which was followed and then admittedly discontinued by the airline*, was contractually embodied so as to prohibit a departure there-

* The full text of the court’s opinion is reported at 48 LRRM 2487 and its findings of fact and conclusions of law are reported in 43 CCH Labor Cases at para. 17064.

from by the carrier was for the Adjustment Board to make and not for the court to decide under Section 2, Seventh or Section 6 of the Railway Labor Act.

This is precisely the course which the District Court should have followed in this case. Instead, it compelled the resurrection of a practice discontinued over three years ago—and this after expressly acknowledging that it was without jurisdiction to determine what was or was not embodied in the agreement (Jt. A. 469, 475). This, we submit, was totally erroneous. The weight, if any,* to be accorded past practice is for the Adjustment Board to decide and not for the court. See, *e.g.*, *Locomotive Engineers v. Missouri-K.-T. R. Co.*, 363 U. S. 528, 533 fn. 5 (1960); *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 565-7 (1946); *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 242-4 (1950); compare *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567-8 (1960); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

B. Southern's Proposal of September 16, 1960, Is Both Legally and Factually Irrelevant Here.

The erroneous result reached below is further attributable to the mistaken assumption that Southern's proposal of September 16, 1960 operated retroactively to deprive the carrier of its previously asserted contractual right to refuse to employ new hires in order to run all its trains with firemen (Jt. A. 473).

* There have been numerous instances in which the NRAB has not given weight to past practice. Thus in *Firemen v. Texas Mexican Railway Co.*, Award No. 13221 (1st Div. 1950), the Board concluded that because a

"carrier did not at the inception of the schedule observe its provisions in a manner it was entitled to may not now be urged as a basis or reason for denying carrier rights it possessed under the schedule or to hold that such action constituted a waiver."

See also, *e.g.*, *Engineers v. Terminal Railroad Ass'n of St. Louis*, Award No. 19387 at p. 18 (1st Div. 1960).

If, as the District Court implies (*ibid.*), the mere service of this proposal to quiet a pre-existing contractual controversy could years later transform such a "minor" dispute into a Railway Labor Act violation, no carrier would ever serve such a notice no matter how helpful it might otherwise promise to be. To do so would make the carrier vulnerable to the position the District Court apparently took here (*ibid.*), i.e., that the mere service of such a proposal binds the railroad to the union's interpretation of the existing contract, albeit the carrier had adopted a contrary position as to the meaning of that contract before service of the proposal. This, we submit, is not only unsound policy, but is also contrary to the decisions in *Rutland Ry. Corp. v. Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), *cert. denied*, 372 U. S. 954 (1963) and *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (7th Cir.), *cert. denied*, 368 U. S. 900 (1961).

In the *Hilbert* case, the railroad, on November 2, 1959, served all operating organizations with a bargaining proposal pursuant to Section 6 of the Railway Labor Act for "a general revision of the collective bargaining agreement covering [its] employees." * If the proposal had been accepted, home terminals could without question have been abolished at will by the carrier. In April 1960, while negotiations on the proposal were pending, a dispute arose under the existing agreement (Reg. 5-P-1) as to whether the railroad already had the unilateral right under that contract to establish a new home terminal for engineers without first consulting with the union.

The union sought to enjoin the railroad's plan to do so on the ground that a "major" dispute was involved and that the carrier had changed working conditions in viola-

* Compare P. Ex. 4 at Jt. A. 430.

tion of the status quo provisions of the Railway Labor Act. It relied on the service of the Section 6 proposal, much as the Brotherhood does in this case. The railroad replied that a "minor" dispute was presented and that it was not "extinguished" because a proposal relating to the same subject was pending.

The Seventh Circuit affirmed the District Court's decision granting the carrier's motion *for summary judgment*. It rejected the union's contention that the Section 6 notice "extinguished" the "minor" dispute, saying (p. 885):

"In contending that this case involves a major dispute, plaintiffs rely principally upon the section 6 notice issued by the defendant railroad on November 2, 1959. Both parties agree this notice created a major dispute. From this, plaintiffs contend that the notices of April 18, 1960, and the actions taken pursuant thereto, which are the center of the controversy in this case, involve some of the same proposals covered by the November 2, 1959 notice and, therefore, violated the *status quo* provisions of section 6 of the Act.

• • • • •

"We agree with the District Court that the section 6 notice of November 2, 1959 is not involved in this case. The dispute here relates to the meaning of Regulation 5-P-1. That rule remains in effect. The railroad contends that under its existing collective bargaining agreement, it has the unilateral authority to transfer crews between established terminals. The plaintiffs argue the contract gives no such authority, and that Regulation 5-P-1 would be violated if the railroad carried out its announced program. It is obvious this dispute involves a conflict over the interpretation or application of the provisions of the existing contract. We hold that a minor dispute is presented."

Hilbert was subsequently cited with approval by the Second Circuit in *Rutland*. There, also, it was held that a "minor" dispute existed despite the fact that the railroad had previously served a Section 6 notice for a change relating to the same general subject matter. See, a'so, *Flight Engineers Int'l Ass'n, WES Chapter v. Western Airlines, Inc., supra*.

The *Hilbert* and *Rutland* cases teach that whether a purported change in working conditions violates the Railway Labor Act is not determined by the mere existence of an unresolved bargaining proposal on which mediation has not been exhausted. The record in the present case is stronger than was the record in either *Hilbert* or *Rutland*. Here, the contractual controversy arose in 1958 and was in full flower in September and October of 1959 (Jt. A. 163-165, 267-268, 295-297). In fact, the Brotherhood conceded (Jt. A. 178-179) that the pre-existing dispute over the meaning of Section 4 had reached the "critical" stage early in 1960—about three months prior to the service of Southern's proposal. In both *Hilbert* and *Rutland* the contractual dispute arose *after* the service of the proposals in question.

More importantly, in neither *Hilbert* nor *Rutland* did the plaintiff concede, as has the Brotherhood in this case, that the bargaining proposals were never live issues—that the controversy between the parties was limited to a dispute over interpretation of the contract (Jt. A. 210, 321-322). The Brotherhood's General Chairman admitted that the subject of the disagreement between the parties between October 1960 and August 1962 was Section 4 and that Southern's proposal of September 16, 1960 was not involved at all (Jt. A. 210):

"Q. You had a lot of special conversation and such with Southern you say you did not have with other railroads? A. Not involved in the section 6.

Q. But you were having quite a scrap all through this?

A. Not with the Section 6 notice." (Emphasis added.)

Indeed, all of the evidence demonstrates that the protracted controversy always centered about the meaning of Section 4 of the Diesel Agreement and other related provisions of the contract (see, *e.g.*, Jt. A. 253-256, 267-287, 314, 318-322, 341-343, 374-383, 385-407).

POINT II

The District Court had neither the authority nor jurisdiction, in this plenary action brought by a labor organization, to issue injunctive relief, admittedly not in aid of its jurisdiction, but to maintain the "status quo" during the pendency of proceedings before the National Railroad Adjustment Board.

In Point I, we demonstrated that the root issue here is contractual in nature and is a "minor" dispute within the primary exclusive administrative jurisdiction of the National Railroad Adjustment Board. Although the District Court recognized this (Jt. A. 475), it, nevertheless, issued a mandatory injunction to restore a "status quo" that had not existed since 1959. We shall here demonstrate that the court had neither the authority nor jurisdiction to issue such a mandate.

A. The District Court Lacked Authority to Issue the Order Appealed From.

In *Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30 (1957) the Court announced that strikes by railway labor organizations to force adoption of their positions in "minor" disputes were prohibited by the Railway Labor Act and were enjoined.

Subsequently, in *Locomotive Engineers v. Missouri-K.-T. R. Co.*, 363 U. S. 528 (1960) the Court held that in an injunction action *brought by a carrier* under the *Chicago River* doctrine the courts, in the exercise of their traditional powers, might *condition* their orders so as to prevent irreparable injury to individual employees during the pendency of National Railroad Adjustment Board proceedings. Explicitly left open was the question:

"whether a federal court can during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which give rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief. As we read the order of the District Court, this case does not involve independent relief for the union" (363 U. S. at p. 531 fn. 3).

This appeal squarely raises the precise question left open in the *M.-K.-T.* case. We submit that the correct answer is that the federal courts lack authority to issue such status quo orders in plenary actions brought by labor organizations.

There is substantial doubt on the general question whether the federal courts, at the behest of private litigants, have authority to issue injunctive relief not designed to aid their own jurisdiction, but to preserve the status quo during the pendency of administrative proceedings. See, e.g., *Board v. Great Northern Ry. Co.*, 281 U. S. 412, 429 (1930); *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440-41 (1906); *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 166 Fed. 206, 217-18 (5th Cir. 1909), *aff'd*, 215 U. S. 501 (1910); *cf.*, *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U. S. 658, 663, fns. 6, 14 (1963); *West India Fruit & S. S. Co. v. Seatrain Lines, Inc.*, 170

F. 2d 775, 778-9 (2d Cir. 1948), *cert. dismissed*, 336 U. S. 908 (1949); *Avon Dairy Co. v. Eisaman*, 69 F. Supp. 500, 502 (N. D. Ohio 1946).

But there is plainly no such power under the Railway Labor Act. In *General Committee v. Missouri-K. T. R. Co.*, 320 U. S. 323, 332-3 (1943) the Court, after a review of the legislative history of the Railway Labor Act, said:

" In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*" (Emphasis added.)

The Supreme Court has made it plain that Section 3, First of the Railway Labor Act, 45 U. S. C. §153, First, is to be considered as establishing a "comprehensive" compulsory arbitration system for resolution of contractual labor disputes in the railroad industry. *Locomotive Engineers v. Louisville & N. R. Co.*, 373 U. S. 33, 38 (1963); *Trainmen v. Chicago River & I. R. Co.*, *supra*, at p. 39. In the *Louisville & N. R.* case, the Court summarized the statutory provisions as follows (p. 37):

"Subsections (a) to (h) of §3 First create the National Railroad Adjustment Board and define its composition and duties. Subsection (i) provides that it shall be the duty of both the carrier and the union to negotiate on the property concerning all minor disputes which arise; failing adjustment by this means, 'the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *.' Subsection (l) directs the appointment of a neutral referee to sit on the Adjustment Board in the event its regular members are evenly divided. Subsection (m) makes awards of the Adjustment Board 'final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' It further directs the Adjustment Board to entertain a petition for clarification of its award if a dispute should arise over its meaning. And finally, subsections (o) and (p) describe the manner in which Adjustment Board awards may be enforced, providing for the issuance of an order by the Board itself and for judicial action to enforce such orders."

There is absolutely nothing in Section 3, First or in any other provision of the Railway Labor Act which empowers the federal courts in plenary actions brought by labor organizations to issue status quo orders of the type here appealed from. On the contrary, as the Court pointed out in *General Committee v. Missouri-K.T. R. Co.*, *supra*: "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." This principle, we submit, is controlling here. Neither *Locomotive Engineers v. Missouri-K.T. R. Co.*, *supra*, nor *Hilbert v. Pennsylvania R. Co.*, *supra*, relied on below, can be reasonably construed to support a contrary result.

B. The Norris-LaGuardia Act Deprived The District Court of Jurisdiction.

The dispute over the meaning of Section 4 of the Diesel Agreement, although subject to compulsory arbitration under the Railway Labor Act, is nonetheless a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U. S. C. §101, *et seq.* See *e.g.*, *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962); *Local 205 v. General Electric Co.*, 233 F. 2d 85, 90-91 (1st Cir. 1956), *aff'd*, 353 U. S. 547 (1957); *Retail Clerks v. Alfred M. Lewis, Inc.* (not officially reported), 48 LRRM 3136, 3137 (S. D. Cal. 1961); *Electrical Workers v. Stone & Webster Engineering Corp.*, 163 F. Supp. 894, 896 (W. D. La. 1958); *cf. Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957).

As we shall presently demonstrate, the Norris-LaGuardia Act is a valid defense regardless of whether raised by a union or an employer. It deprived the court below of jurisdiction to issue injunctive relief.

1. The Norris-LaGuardia Act Is a Valid Jurisdictional Defense Whether a Union or an Employer Is Plaintiff.

The overwhelming majority of decisions recognize this to be so. As pointed out in *Clune v. Publishers' Ass'n*, 214 F. Supp. 520, 528 (S. D. N. Y.), *aff'd per curiam*, 314 F. 2d 343 (2d Cir. 1963):

" . . . [T]he Norris-LaGuardia Act (29 U. S. C. §§53, 104, 113) applies to injunctions sought against employers as well as to injunctions sought against employees or labor unions. The legislative history of the Norris-LaGuardia Act confirms this interpretation. The Report of the Senate Committee on the Judiciary (S. Rep. No. 163, 72nd Cong., 1st Sess. (1932), p. 19) makes this clear:

'Moreover it will be observed that this section (§6), as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.'"

See also, *Amazon Cotton Mill Co. v. Textile Workers*, 167 F. 2d 183 (4th Cir. 1948); *Kennedy v. Long Island R. Co.*, 211 F. Supp. 478, 486 (S. D. N. Y. 1962); *Electrical Workers v. Stone & Webster Engineering Corp.*, 163 F. Supp. 894, 896 (W. D. La. 1958); *Textile Workers v. Berryton Mills* (not officially reported), 28 LRRM 2540, 20 CCH Labor Cases para. 66,519 (N. D. Ga. 1951); *United Auto Workers, Local 937 v. Royal Typewriter Co.*, 88 F. Supp. 669 (D. Conn. 1949); *Terrio v. S. N. Nielsen Const. Co.*, 30 F. Supp. 770 (E. D. La. 1939).*

2. The Norris-LaGuardia Act Deprives the District Courts of Jurisdiction to Issue "Status Quo" Orders.

This principle is clearly stated in *Publishers' Ass'n v. New York Mailers' Union*, 317 F. 2d 625 (2d Cir. 1963), which was not decided until after the opinion below had been handed down. There, a foreman ordered that an employee be laid off; both were members of the union. The employee then filed charges with the union to the effect that the foreman had violated the union's constitution by the layoff. The union membership voted to consider the charges and an investigating committee was appointed.

* We submit, with all deference, that the decision of the Seventh Circuit to the contrary in *Brotherhood of Locomotive Engineers v. Baltimore & O. E. Co.*, 310 F. 2d 513 (7th Cir. 1962) is incorrect.

The employer association then submitted a grievance to the union charging that by acting on the complaint of the employee it had violated the collective bargaining agreement. When the union refused to arbitrate whether the contract had been so violated, the association commenced an action under Section 301(a) of the Taft-Hartley Act, 29 U. S. C. §185(a), to compel arbitration "and for a stay of the union's action [against the foreman] pending such arbitration." The District Court compelled arbitration and issued the stay to maintain the status quo.

In a unanimous decision the Second Circuit, by Judge Hays, held that while the District Court had correctly compelled arbitration, the Norris-LaGuardia Act deprived it of jurisdiction to maintain the status quo—to stay the union's action against the foreman pending arbitration as to whether that action violated the contract. In so holding, the court said (pp. 625-7):

"It would seem reasonable that if the court could properly compel arbitration it could stay, pending arbitration, the acts which are alleged to violate the collective agreement and are the subject of the arbitration procedure. But wherever a question of the availability of an injunction arises in a labor context we are called upon to consider the effect of the Norris-LaGuardia Act. That Act limits severely the power of a federal court to issue an injunction in a case involving or growing out of a labor dispute. It is quite clear that the union's action on the Kelly charges both involves and grows out of a labor dispute."

• • • • •

"• • • • • Section 7 applies to injunctions in any cases involving or growing out of a labor dispute and prohibits the issuance of injunctions in all such cases,

without regard to the nature of the activities against which the injunction is sought, unless certain procedural requirements are met and unless the court issuing the injunction makes certain findings. Not only have these requirements not been met in the present case but it would clearly be impossible for the court to make the required findings."

• • • • •

"Since, then, the Norris-LaGuardia Act prevents the issuance of the stay which was granted by the district court, we must reverse that part of the order."

See, also, *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962).

This case and the *Publishers' Ass'n* case are alike, the sole distinction being that in this case it is the union, not the employer, which has sought and obtained a stay pending arbitration. Since the Norris-LaGuardia Act deprived the District Court of jurisdiction to grant such an order in the *Publishers' Ass'n* case, it likewise deprived the court below of jurisdiction to issue the order here appealed from. As we point out above (pp. 31-32, *supra*), the Norris-LaGuardia Act is equally applicable whether invoked by an employer or a union.

POINT III

In the circumstances of this case the District Court's "status quo" order constitutes reversible error.

In this Point we shall demonstrate that even if the court below had had the power to act, its having done so in the circumstances of this case constituted an abuse of such power. More particularly, the purported "status quo order", which is mandatory in character and seeks to re-

store a status that had been nonexistent for more than three years before the commencement of this action, should be reversed because:

A. Southern is being caused irreparable injury by the mandate, and neither the Brotherhood nor any of Southern's firemen represented by it would have suffered irreparable injury by denial of the injunction;

B. There is no evidence to support the court's conclusion (Jt. A. 474) that the public interest would otherwise have been adversely effected; and

C. The retroactive nature of this mandatory process renders it devoid of equity.

A. The Total Absence of Irreparable Injury.

The Brotherhood made no showing of irreparable injury and the District Court so found:

"This Court is mindful of the fact that the Brotherhood has not demonstrated it will suffer irreparable injury absent the mandatory injunction which the union requests. Such a showing is normally required in a court of equity when this extraordinary relief is granted." (Jt. A. 474-475.)

There is also no evidence that any of Southern's firemen would have been injured had this matter been permitted to proceed before the National Railroad Adjustment Board without judicial interference. We therefore find inexplicable the concern expressed by the court (Jt. A. 475) for "a large and skilled craft of workmen with a long heritage of service to the railroads." Plainly, the people referred to are the very firemen represented by the very Brotherhood which was found not likely to be subjected to any irreparable injury.

" . . . [M]andatory injunctions are rarely issued . . . except on the clearest of equitable grounds." *O'Malley v. Chrysler Corp.*, 160 F. 2d 35, 36 (7th Cir. 1947). See also, e.g., *W. A. Mack, Inc. v. General Motors Corp.*, 260 F. 2d 886, 890 (7th Cir. 1958); *Ricou v. International Paper Co.*, 117 F. Supp. 128, 132 (W. D. La. 1953).

Moreover, irreparable injury must be established to a virtual certainty before such an injunction may issue. To illustrate, in *United States v. Bigan*, 170 F. Supp. 219, 225-6 (W. D. Pa. 1959), *aff'd*, 274 F. 2d 729, 732-3 (3d Cir. 1960), the court explained that

" . . . The mere possibility of, or fear of future injury . . . is not grounds for a mandatory injunction and equity will not interfere where the anticipated injury is doubtful or speculative; reasonable probability or even reasonable certainty of irreparable injury is required."

Nor is the requirement of irreparable injury obviated by anything said in *Locomotive Engineers v. Missouri-K.-T. R. Co.*, 363 U. S. 528 (1960) (compare, *Jt. A.* 470-471). The status quo provisions passed upon by the Court in that case were *conditions* to an injunction sought by a carrier against a "minor" dispute strike (see Point II, A, *supra*, at p. 28). No such injunction is here involved. But, in any event, the Court made it quite clear that even such *conditions* could not be imposed absent a plain showing of irreparable injury, saying (p. 533-34):

" . . . [N]ot all disputes coming before the Adjustment Board threaten irreparable injury and justify the attachment of a condition."

Subsequently, in *Transport Workers v. Union Depot Co.* (not officially reported), 49 LRRM 2539 (S. D. Ohio 1962) this principle was applied to deny a status quo injunction. The union sought a "mandatory" injunction restraining the company from merging two seniority districts and directing it to restore and maintain the status quo until the National Railroad Adjustment Board could decide whether the merger was permitted under the collective agreement. The court dismissed the complaint stating that it would "take no action . . . until the Adjustment Board acts." It ruled further that the injunction must be denied because the plaintiff had failed to establish irreparable injury, saying:

"*Second.* There is yet another reason for denying the application. It is elementary that an injunction should not be granted unless the Court finds that the defendant's action will cause irreparable injury, loss or damages to plaintiff and the legal remedy is inadequate.

"The Court is unable to make such a finding in this matter." (p. 2539)

Manifestly, the District Court's order is erroneous in the face of its own determination that the Brotherhood would suffer no irreparable injury by the denial of injunctive relief (Jt. A. 474-475).^{*} This is all the more so because by operation of that mandate Southern has been forced to hire many new firemen at a substantial cost which will not be recoverable after a favorable decision by the Adjustment Board.

* Compare the comments of the Brotherhood's President at p. 10, *supra*.

B. There Is No Evidence to Demonstrate That the Public Interest Would Have Been Adversely Affected by Denial of the Relief Sought.

In issuing its order the District Court relied (Jt. A. 474) upon *Virginian Ry. Co. v. System Federation No. 40*, 330 U. S. 515, 551 (1937) to conclude that it was empowered to go much farther "in furtherance of the public interest" than it might go "when only private interests are involved."

That case, however, is inapposite. The Supreme Court was there concerned with the "propriety of relief in equity" of an order requiring a railroad and a union to negotiate as required by law. It held that because the Railway Labor Act explicitly made such "negotiation obligatory", the parties would be required to bargain. Although the Court noted that equity might go farther in granting relief where the public interest is involved than in disputes between private litigants, it is plain from a reading of the decision (300 U. S. 549-53) that the Court was referring only to a public interest explicitly declared and protected by Congress. Its decision did not extend to subjective appraisals by courts of what the public interest ought to be.

As we demonstrated in Point I, *supra*, at pp. 17-27, no violation of the Railway Labor Act has been committed by Southern and there is thus no statutory duty unfulfilled by the carrier. There is, in short, nothing in this record to show that the action taken by Southern adversely affected a public interest which Congress has protected.

C. The Retroactive Nature of the Order Entered Below Renders It Devoid of Equity.

Although the District Court's order purports to maintain the "status quo" it is an open-ended injunction to restore a status quo which had not existed since the beginning of 1959 (Jt. A. 477). The court was unable to cite any precedent in support of this extraordinary mandate.

It is a basic principle of equity jurisprudence "that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*." *Porter v. Lee*, 328 U. S. 246, 251 (1946); see also, *e.g.*, *Jones v. S. E. C.*, 298 U. S. 1, 15-16 (1936); *Texas & N. O. R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475, 478 (1928).

Implicit in this rule is the correlative principle that a court may not reach back to restore a status quo which was discontinued long before the action for injunction was commenced. This is precisely the principle which the District Court ignored and, in so doing, committed reversible error.

The Brotherhood had ample opportunity to submit this matter to the National Railroad Adjustment Board in 1959 and thereafter. Instead, it chose to threaten strike action, to sleep on its rights (including its judicial rights and remedies, if any) for over three years and, in fact, to balk attempts to negotiate a revision of Section 4 of the Diesel Agreement which would have settled the controversy once and for all (Jt. A. 323-327, 384). Nevertheless, the District Court granted to the Brotherhood everything it might have received had it acted with diligence. Plainly, "[i]njunctive relief is reserved for those who manifest reasonable diligence in asserting their rights to equitable protection". *Reams v. Vrooman-Fehn Printing Co.*, 140 F. 2d 237, 242 (6th Cir. 1944). This the Brotherhood simply failed to do and the injunction the District Court issued is, therefore, most obviously devoid of equity.

POINT IV

The equitable doctrine of "unclean hands," as recognized and codified in Section 8 of the Norris-LaGuardia Act, bars the injunctive relief issued herein.

The doctrine of "unclean hands" applies in this action brought under the Railway Labor Act as it would in any other equitable proceeding. This point was recently clarified in *Air Line Pilots v. Southern Airways, Inc.* (not officially reported), 49 LRRM 3145, 3155 (M. D. Tenn. 1962). There, although the carrier had violated the Railway Labor Act (pp. 3152-3), the court refused to reinstate strikers at the expense of newly hired replacements because the union had been totally unreasonable in its negotiations and thus had "not come into court with clean hands."

But beyond this, the doctrine of "unclean hands" is so vital in labor cases that it was codified and made a jurisdictional obstacle in Section 8 of the Norris-LaGuardia Act, 29 U. S. C. §108, which provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

It is settled law that Section 8 is an absolute bar to injunctive relief regardless of the substantive merits of the plaintiff's case. See *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 60, 66 (1944) where the Court barred injunctive relief against a violent strike in time of war because

the plaintiff had rejected voluntary arbitration. Significantly, when faced with a "minor" dispute in *Rutland Ry. Corp. v. Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), cert. denied, 372 U. S. 954 (1963), the Second Circuit applied Section 8 as a bar to injunctive relief, stating (at p. 39):

"Section 8 . . . imposes two different requirements on one who seeks injunctive relief in a labor dispute. He must comply with all his legal obligations relevant to the dispute and, further, he must make every reasonable effort to settle the dispute by the methods enumerated. *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*, 321 U. S. 50 (1944). This is known as the 'clean hands' provision of the Norris-LaGuardia Act. See 75 Cong. Rec. 5464 (1932)."

The facts, as developed at the trial, demonstrate that both the doctrine of "unclean hands" and Section 8 of the Norris-LaGuardia Act are applicable here and bar injunctive relief. A summary of those facts is set forth below.

A. The July 26, 1960 Threatened Strike.

The strike set for July 26, 1960, was for the purpose of forcing Southern to accept the Brotherhood's interpretation and application of Section 4 of the Diesel Agreement (Jt. A. 301, 312, 314-317). The only meaningful controversy that existed in July 1960 was the "minor" dispute over Section 4. The threatened strike was thus nothing more than a power play in that "minor" dispute. It is settled that such strikes are unlawful. See, e.g., *Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30, 39 (1957).

B. The Failure to Exhaust Administrative Remedies.

Regardless of the legal effect of the proposals subsequently served by the Brotherhood and Southern, the controversy over the meaning of Section 4, which began in 1958 (Jt. A. 163-165), has always been a "minor" dispute which could have been submitted by the Brotherhood to the Adjustment Board. President Gilbert's letter of May 22, 1962 (Jt. A. 321-322) as much as admits this (see also, Jt. A. 210). The Brotherhood always had an administrative remedy available before the National Railroad Adjustment Board. This it has not denied, merely claiming that under the Railway Labor Act it was afforded an alternative remedy in the District Court. Compare *International Ass'n of Machinists v. Eastern Airlines, Inc.*, *supra*, at pp. 4-5.

The Brotherhood's failure to make use of the available administrative remedy in and of itself requires denial of injunctive relief under Section 8 of the Norris-LaGuardia Act and under the doctrine of "unclean hands". This is the teaching of *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F. 2d 206, 211-212 (8th Cir. 1962):

"If the party who seeks an injunction has available administrative steps which he has not pursued, it is evident that the injunction is not intended to serve the only purpose for which it may be granted. *Unless the party seeking an injunction has exhausted the administrative remedies available to him, jurisdiction to grant the injunction is lacking by virtue of the Norris-LaGuardia Act.*" (Emphasis added.)

C. The Brotherhood's Refusal to Bargain in Good Faith With Respect to Southern's Proposal.

In its second claim (Jt. A. 22-25), the Brotherhood maintained that Southern's unlawful conduct stemmed from the implementation of its proposal of September 16, 1960. This

claim appears to have been given credence by the court below (Jt. A. 473). Assuming the claim were well founded, which it is not (see Point I, B, *supra*, at pp. 23-27), the Brotherhood was not entitled to an injunction because it unlawfully refused to bargain with respect to that proposal.

Section 8 of the Norris-LaGuardia Act explicitly forbids injunctive relief to a plaintiff "who has failed to comply with *any* obligation imposed by law which is involved in the labor dispute in question." * There is no doubt that, if the Brotherhood's view is accepted, Southern's proposal was in issue in this dispute. There similarly can be no doubt that the Brotherhood committed an unlawful refusal to bargain in good faith with respect to it.

On August 13, 1962, in the clearest and most unequivocal terms, McCollum told Tolleson that the Brotherhood would not bargain:

" * * * Why negotiate an agreement when you lack honesty, decency and integrity [to] fulfill present agreement? Present time can be better spent preparing strike or court action" (Jt. A. 327).

D. The January 10, 1963 Threatened Strike Over Section 4.

While this action was pending below, the Brotherhood conceived, planned and called a strike to force Southern to hire new firemen and use them on all trains—to require compliance with the Brotherhood's interpretation and application of Section 4 of the Diesel Agreement. This strike differed from the one called for July 26, 1960 only in that its real purpose was obscured.

Southern's Exhibit 71 (Jt. A. 411-413) shows that on November 12, 1962, the Brotherhood's General Chairman

* Emphasis added.

was planning the strike while his organization was preparing to move for a preliminary injunction in the court below. The exhibit makes it plain that if the Brotherhood did not succeed on its motion for a preliminary injunction, it would not await the trial, but would, instead call a strike to enforce its position.

On or about November 15, 1962, Vice President Jennings of the Brotherhood wrote a memorandum to his President (Jt. A. 331-332) saying that because of the court action the purpose of the planned strike would ostensibly have to be switched to other issues. Southern's Exhibit 20 (Jt. A. 333-340) shows that the Brotherhood's General Chairman was quick to fall in line. In subsequent planning for the strike he deleted all reference to Section 4. With its purpose thus obscured, the strike was called on January 10, 1963 for January 13, 1963—only to be enjoined by the court below (Jt. A. 464).

We can think of no more flagrant example of "unclean hands"—no more patent failure to comply with the obligations of Section 8 of the Norris-LaGuardia Act—than this strike called in derogation of the court's jurisdiction—the very jurisdiction the Brotherhood had itself invoked. See *Flight Engineers v. American Airlines, Inc.*, 303 F. 2d 5, 11 (5th Cir., 1962), *appeal dismissed*, 314 F. 2d 500 (5th Cir. 1963).

The record shows, in sum, that the threatened strike of July 26, 1960 involved nothing more than a "minor" dispute, and was thus unlawful. Furthermore, the Brotherhood failed to pursue its administrative remedy by submitting the Section 4 controversy to the National Railroad Adjustment Board. To this must be added the Brotherhood's unlawful refusal to bargain with respect to Southern's September 16, 1960 Section 6 notice. Finally, and

most offensive of all, was the strike called while this matter was pending before the District Court for determination. Each of these facts, standing alone, would be sufficient to deprive the Brotherhood of the injunctive relief obtained below. Together, they compel reversal irrespective of the Court's view of the merits of the controversy.

CONCLUSION

The order should be reversed with directions to vacate the mandatory injunction.

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STATUTORY APPENDIX**Railway Labor Act****Section 2, First, 45 U. S. C., §152, First**

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh, 45 U. S. C., §152, Seventh

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 3, First, 45 U. S. C., §153, First

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment

and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary

traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom

shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes,

when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make

such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate

one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such re-

gional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) of this section, with respect to a division of the Adjustment Board."

Section 5, First, 45 U. S. C., §155, First

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in para-

graph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6, 45 U. S. C., §156

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Norris-LaGuardia Act**Section 1, 29 U. S. C., §101**

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

Section 4, 29 U. S. C., §104 (in pertinent part)

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;"

• • • •

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 7, 29 U. S. C., §107 (in pertinent part)

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property * * *."

Section 8, 29 U. S. C., §108

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Section 13, 29 U. S. C., §113

"When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of

employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

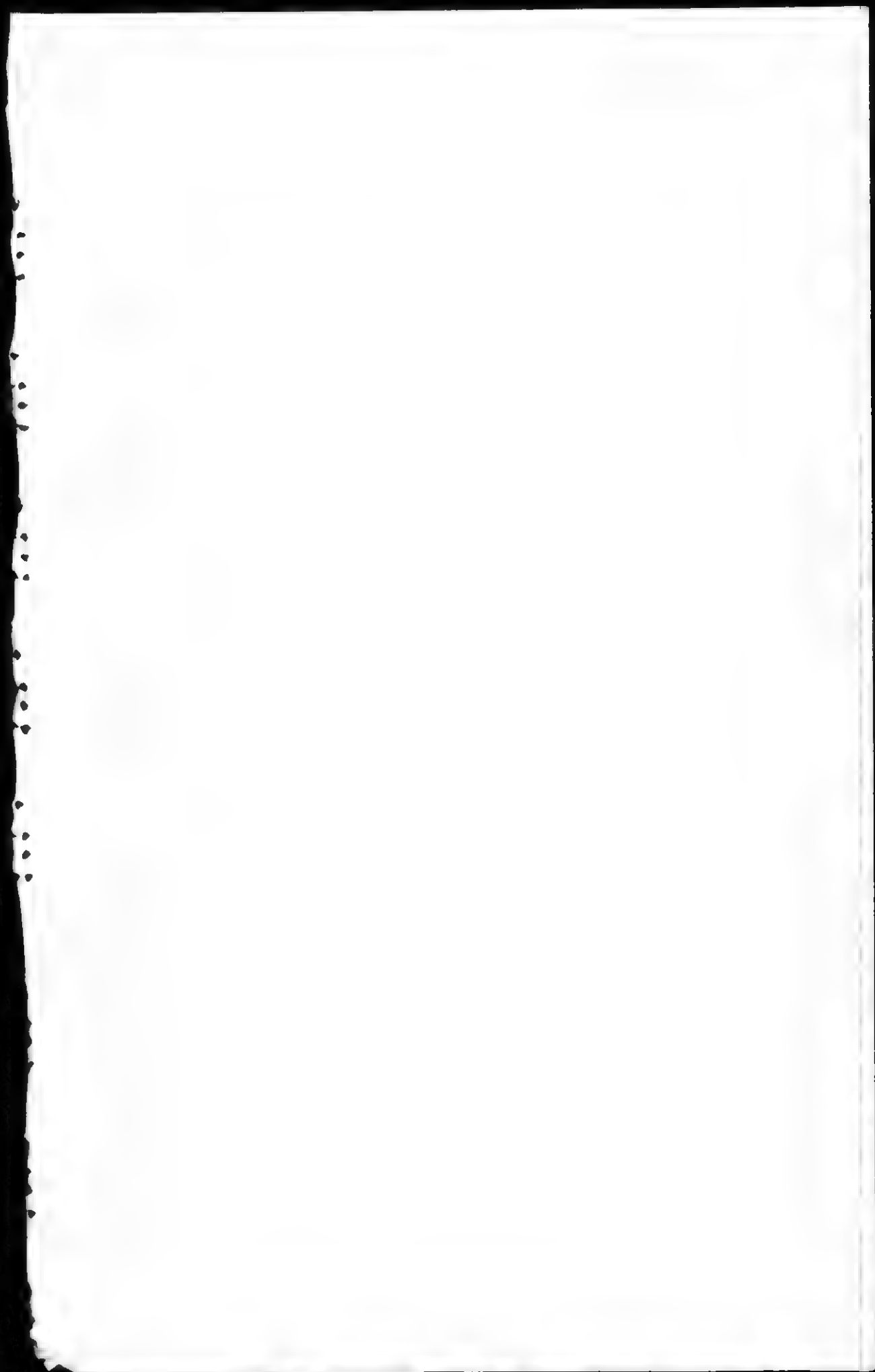
(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

National Labor Relations Act, as Amended**Section 301(a), 29 U. S. C., §185(a)**

“(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”



BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,891

SOUTHERN RAILWAY COMPANY, *et al.*, Appellants

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,
Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

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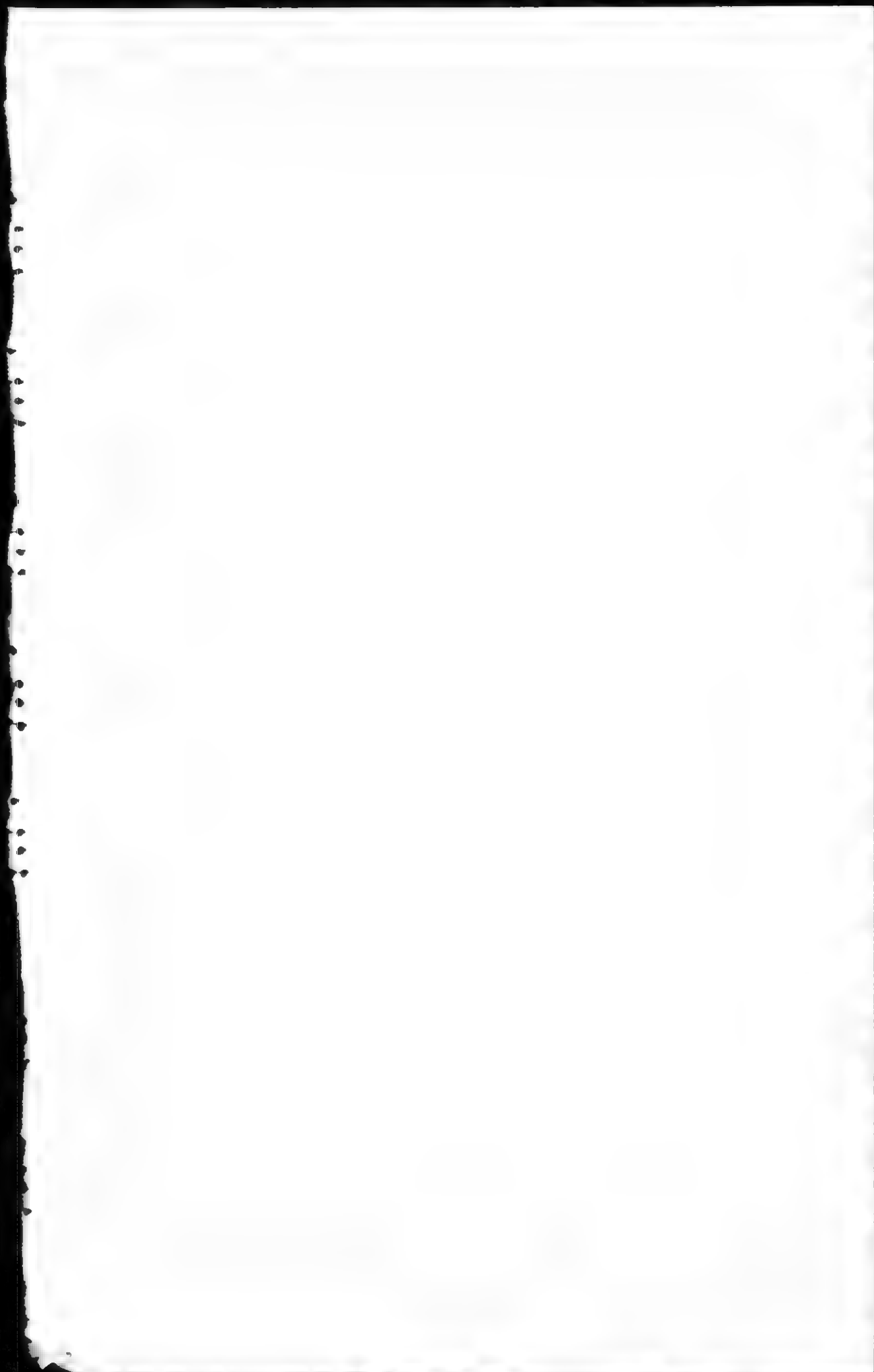
United States Court of Appeals
For the District of Columbia Circuit

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CLERK

John J. Paulson



STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the questions are:

1. When the employment of a fireman has long been embodied in a collective agreement, and a fireman has been consistently employed as a member of the crew, does an ex parte decision thereafter to operate locomotives without a fireman constitute a change in working conditions and a violation of Section 2, Seventh, of the Railway Labor Act?

2. Is a change in working conditions which is in violation of the Act subject to court injunction at the instance of the union?

3. When a working condition has long been established by agreement and the carrier undertakes to change it pursuant to a new and strained interpretation, must the carrier refrain from changing the condition until its new "interpretation" has been ruled on by a competent tribunal or the agreement is changed in conformity with the procedures of the Railway Labor Act?

4. When a carrier has served a notice under Section 6 of its desire to change a collective agreement to effect a change in working conditions, and the services of the National Mediation Board have been invoked and are pending, is the carrier required by Section 6 and Section 5, First, to refrain from changing the working conditions or established practices in effect prior to the serving of the Section 6 notice?

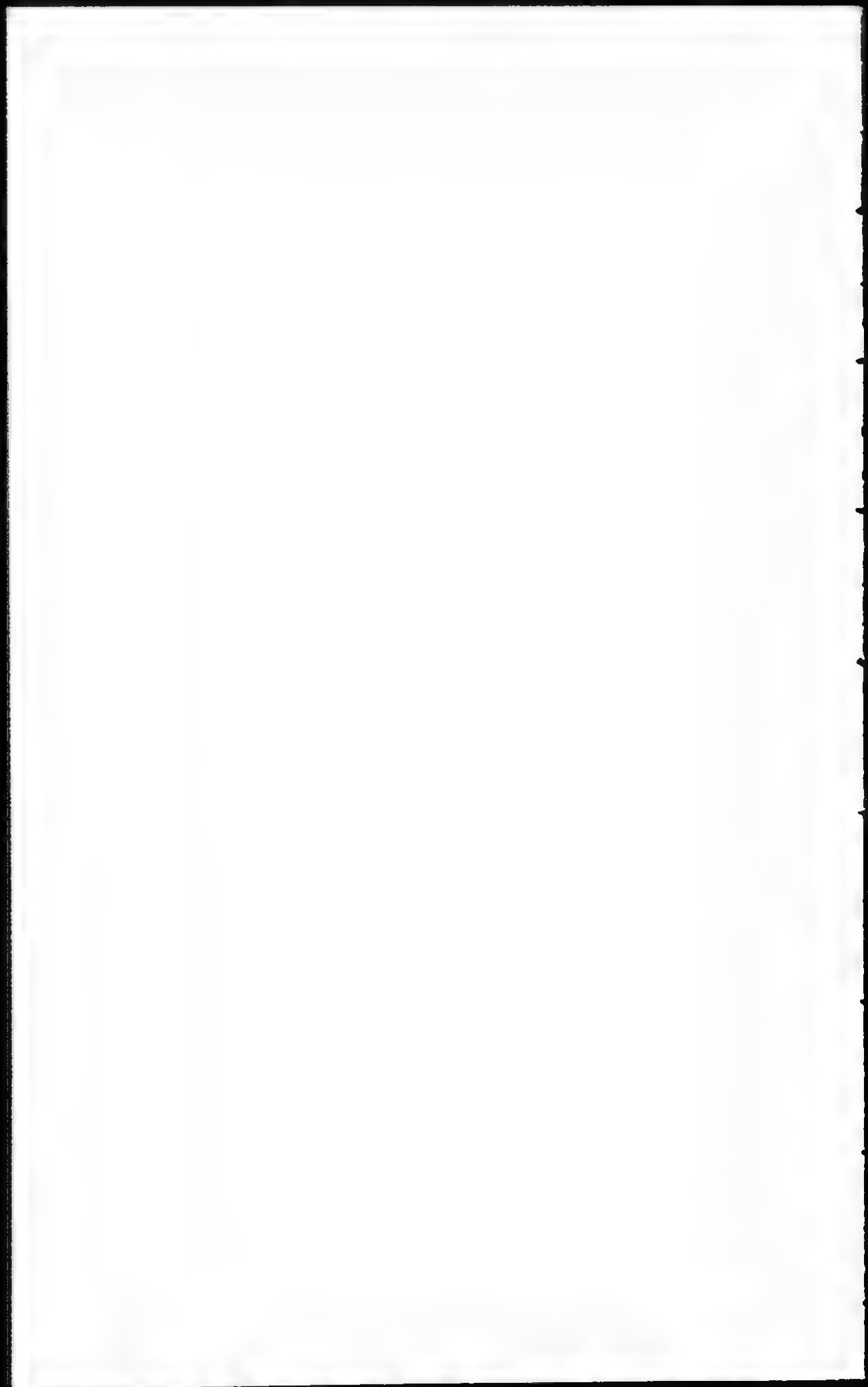


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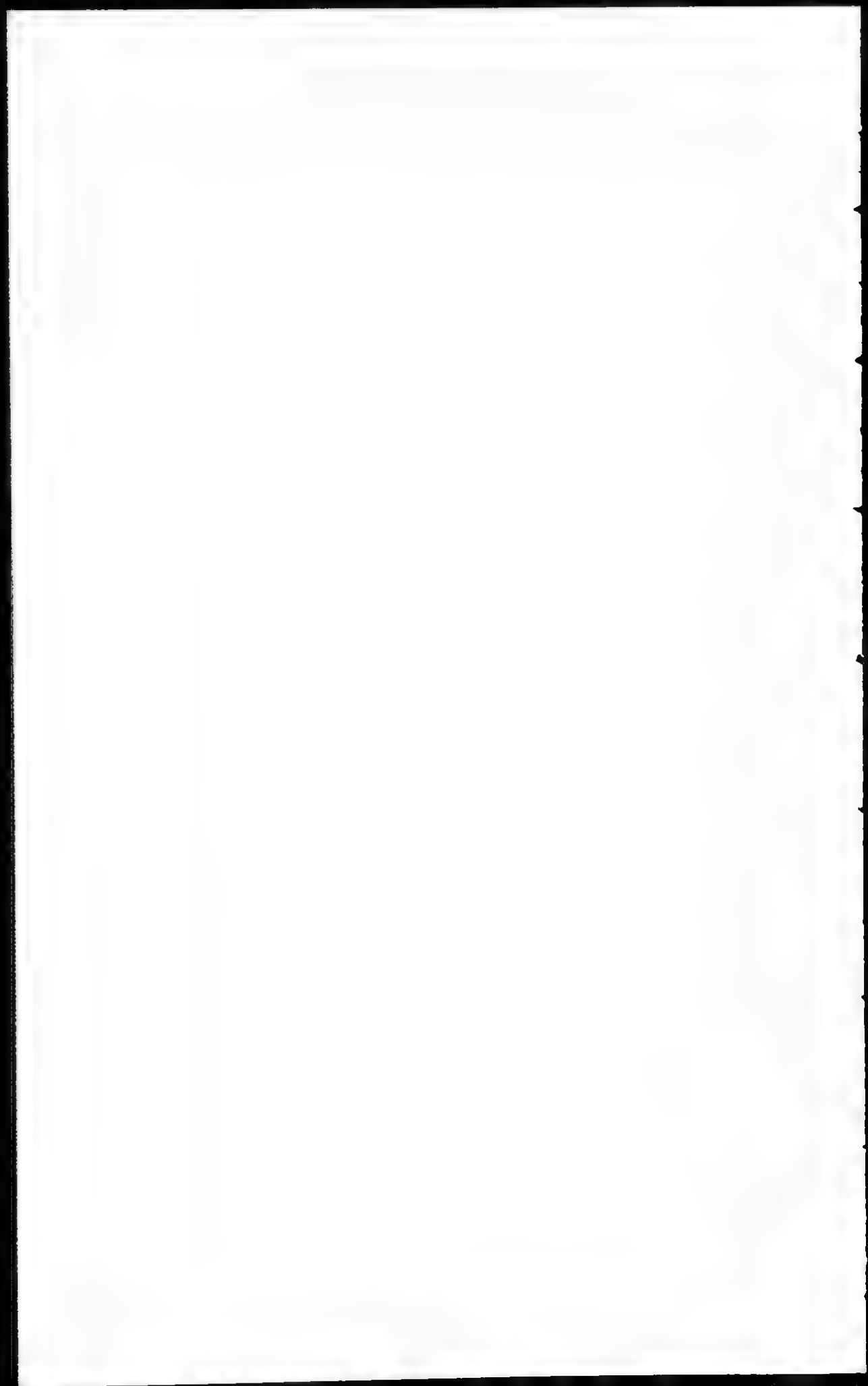
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United States Court of Appeals

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Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The factual assertions made in appellants' Statement of the Case and Statement of Facts are so inaccurately and misleadingly presented, and in so many instances are not supported by the record references, as to require a restatement of much of the facts.

The Diesel locomotive made its advent on American railroads, in passenger service, in 1934 and 1935. It consisted of a single power unit. On February 28, 1937, the Brotherhood concluded the first Diesel manpower agreement on a national basis, but the Southern was not a party to that agreement.

That agreement was later replaced by three Regional Agreements, one of which was the Southeastern Agreement

of May 11, 1944. App. 73. These agreements were the outcome of bargaining initiated by Section 6 notices served by the Brotherhood upon the carriers of the three regions requesting them to agree that additional enginemen be assigned to each of the power units comprising the Diesel locomotive at that time. App. 73.

Southern Railway was a party to the Southeastern Agreement of May 11, 1944. App. 422, 428. Section 3 of the Southeastern Agreement of 1944 reads as follows:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives;" (with certain exceptions not relevant to the issues of this case). App. 423.

Section 4 of this agreement provides that if an additional employee is needed to perform the duties of fireman (helper) on Diesel locomotives, he too will be taken from the seniority ranks of the firemen's craft. The language of the agreement is as follows:

" . . . If an additional man is employed to perform the work customarily performed by firemen (helpers) such man shall also be taken from the seniority ranks of the firemen and his working conditions and rates of pay shall be those which are specified in the firemen's schedule." (Emphasis supplied.) App. 424.

The current National Diesel Agreement, dated May 17, 1950, is the result of Section 6 notices served by the Brotherhood proposing that an additional fireman (helper) be assigned on all Diesel locomotives operated in road service for each four power units or less. App. 62.

The Southern Railway was a party to these proceedings. The negotiators were unable to agree, and an Emergency Board, with Mr. George W. Taylor as chairman, was appointed by the President to investigate the dispute. App. 62-4. After prolonged investigation and hearings the Emergency Board made its report to the President. Its report was adverse to the Brotherhood's request that an

additional fireman be assigned to each four Diesel power plants comprising a "locomotive." App. 64. Some months after the report, the National Diesel Agreement of May 17, 1950 was signed. Section 4 of this agreement is verbatim with Section 3 of the Southeastern Agreement of May 11, 1944, quoted *supra*, except for a minor difference in the exception to this rule. App. 416-17, 423. Section 5 of the current agreement, which refers to the use of a second helper on Diesel locomotives, is also verbatim with the rule quoted *supra* from Section 4 of the May 11, 1944, agreement.

During the 15 years between 1944 and 1959 Southern consistently employed a helper, taken from the seniority ranks of the firemen's craft, on all locomotives employed in freight and switching service. App. 232. The normal practice throughout those years was that the Brotherhood's local chairman on each seniority district would keep close watch on the number of employees maintained on the firemen's extra board and of the mileage per month being earned by each fireman. Whenever freight traffic or switching operations increased and additional firemen were needed the local chairman would suggest to Southern's superintendent on the seniority district where the need arose that additional firemen should be employed, and this request was, without significant exception, acted upon, either by recalling furloughed firemen or, if none were available, by employing new firemen. App. 166-8, 231-2. It is, of course, true that occasionally some difference of opinion would arise between the local chairmen and Southern's local officers regarding the actual need to employ additional firemen.* Such differences were resolved in one

* In testifying that throughout the past years there have been occasional protests to Division superintendents or other local officials about Southern's failure to hire sufficient firemen (Tr. 188-192), General Chairman McCollum was not implying that Southern was operating trains or switching locomotives without a fireman being a member of the crew. Prior to late 1959 the complaints about failing to hire a sufficient number of firemen grew out of the enforcement of the mileage limitation rules. App. 181, 232-3, 372.

manner or another, but there was no instance of a freight train or a switching locomotive designedly being sent out with a crew which did not include a helper taken from the seniority ranks of the firemen's craft.

Throughout the years from May 17, 1950, to April, 1960, Southern has employed new firemen throughout its system as traffic conditions required. On the basis of the 1962 seniority rosters, which were published and distributed by Southern and pertain to all seniority districts comprising the Southern, a total of 259 new employees were added to the firemen's craft. App. 132-3. This figure of 259 newly hired firemen by no means represents the total number of new firemen hired during the period between June, 1950 and April, 1960 because many firemen hired during the period ceased to be employed by April, 1960, and their names do not appear on the 1962 rosters. Some firemen lose their employment because they are discharged by the carrier. Others fail to return to their employment after being furloughed because they are dissatisfied with the unsteady employment experienced by new firemen and decide to turn to or retain other employment. Some firemen are promoted to executive positions with the railroad. Others die, or are disabled by accidents which compel the termination of their employment. App. 132-3. No new firemen have been hired since 1960. App. 152.

General Chairman McCollum estimated that, on the basis of his years of observing these forces at work, 40 per cent of the firemen hired during a ten-year period would disappear from the seniority rosters by the end of a ten-year period, due to natural attrition caused by the reasons indicated. App. 134. On such basis, and the defendants offered no evidence to question the soundness of the estimate, the defendants employed about 430 new firemen in that ten-year period. On cross-examination General Chairman McCollum testified that a very few, perhaps a dozen, of the 259 firemen newly hired between June, 1950, and April, 1960, and still on the seniority roster in 1962, may have

previously been employed on other seniority districts of Southern Railway. App. 157-9, 235.

The extent to which the passage of time and the attendant causes of attrition diminish the number of employees comprising a firemen's craft is indicated by comparing the 1962 seniority rosters and the 1963 seniority rosters. The 1963 rosters contain the names of 178 firemen whose employment began between May 17, 1950, and December 31, 1959. The 1963 rosters have 81 fewer firemen hired between May, 1950, and December 31, 1959, than appear on the 1962 seniority rosters. This loss of 81 firemen between the publication of the 1962 rosters and the 1963 rosters (including furloughed men who refused to return when recalled) is indicative of the rate at which the firemen's craft on the Southern Railway will disappear if Southern's plan to eliminate the craft by attrition continues.

The record indicates that the first deliberate departure from the use by Southern of a full crew occurred late in 1959 on the Washington Division. As these occasions multiplied, a series of protests was made by the Brotherhood's local chairmen and by General Chairman McCollum to the appropriate Southern Railway officers, and on March 25, 1960, a meeting relative to this subject took place between the General Chairman and Southern's Mr. Tolleson. App. 180. On this occasion Mr. Tolleson informed the General Chairman that he did not intend to employ any new firemen on the Washington Division of the Southern Railway and that trains would be operated without the fireman (helper) being a part of the train crew if no fireman was available at the time that the trains were scheduled to leave the terminals. App. 169-71, 173-4, 177-83. As more instances of operation without a fireman developed and the fact became evident to General Chairman McCollum that Southern's management had actually determined upon a policy of operating its trains and switching locomotives with reduced crews, a second conference was held on June 19, 1960, between Southern's

Mr. Tolleson and Mr. Ford and General Chairman McCollum and the Brotherhood's Vice President Mitchell. App. 124-5. At this conference Mr. Tolleson put at rest any doubt that may have existed regarding Southern's intended course of action. App. 172. He made it clear that Southern had decided to employ no additional firemen and that throughout the Southern Railway System freight trains and Diesel locomotives would operate without a fireman being employed in the locomotive whenever the circumstances made this convenient or proper from Southern's point of view. App. 124-5, 168. With this development, General Chairman McCollum began a systematic filing of protests based upon the actual instances in which freight trains or switching locomotives were operated with reduced crews. The first of these protests is dated July 13, 1959. App. 444.

As the available firemen on the numerous seniority districts comprising the Southern Railway System gradually diminish due to the effects of attrition on the firemen's craft and Southern's determination not to employ new firemen, the operation of trains and of switching locomotives with reduced crews has become an increasingly frequent practice, particularly since the filing of the instant suit. App. 144. General Chairman McCollum testified that two daily freight trains were being operated on the Richmond Division almost always without a helper taken from the seniority ranks of the firemen being a member of the crew. App. 129.

We now turn to the record bearing upon the moves made by Southern to terminate the May 17, 1950, Diesel Agreement under the procedure prescribed by the Railway Labor Act. On November 2, 1959, Southern Railway, in conjunction with the other railroads of the country, served upon the Firemen's Brotherhood and the other transportation brotherhoods uniform Section 6 notices which had for their purpose the elimination of major portions of the employment rules and working conditions

contained in the collective agreements applicable to the transportation crafts. App. 81-2, 430. The portion of these Section 6 notices which concerns the use of firemen is contained on page 430 of the Appendix.

On September 7, 1960, the transportation brotherhoods, including the Firemen's Brotherhood, jointly served upon Southern Railway and the other carriers of the country a Section 6 notice which proposed negotiating new rules defining the consist of train and switching crews. App. 85, 431-5. Under date of September 16, 1960, Southern Railway, acting alone and not in concert with other carriers, served upon the Brotherhood a Section 6 notice which, in the main, advanced the same proposal as was contained in the November 2, 1959 joint notices served by all of the carriers on the Firemen's Brotherhood. App. 85-7.

More specifically, the joint notice of November 2, 1959, proposed the elimination of all existing agreements, rules, and regulations requiring the employment or use of firemen (helpers) on Diesel locomotives in freight and switching service, and proposed that henceforth management "shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used" on Diesel locomotives. Southern's second Section 6 notice differed in substance from the November 2, 1959, notice in two respects: it would extend the elimination of firemen to passenger service as well as to all other classes of train and switching service, and it added the proposal that the process of ceasing to employ firemen would be brought about "through the process of attrition." Under date of October 17, 1960, Southern notified the Brotherhood that it was withdrawing its Section 6 notice dated November 2, 1959. App. 129, 197-9, 207, 437. The effect of this withdrawal was that thereby Southern departed from the current national rules movement and thereafter went it alone.

A conference was held on October 10, 1960 between the Brotherhood and Southern which ended with the understanding on the part of the Brotherhood's representatives that negotiations would be held in abeyance to await the outcome of the negotiations at the national level involving the rest of the country's railroads (App. 207, 210, 219), or until either party requested a resumption of conferences. App. 217-9.

On or about May 31, 1962, Southern invoked the services of the National Mediation Board in connection with its September 16, 1960, Section 6 notice. App. 89-90, 138-9, 439. The Board assumed jurisdiction of the matter and conferences were held from August 21 to 30, 1962, without agreement being reached. App. 139, 205. The Board thereupon recessed mediation for the purpose of determining what further action it should take. App. 139. The Board has not relinquished jurisdiction of the controversy, and it is still pending before the Board. App. 90, 138-9.

SUMMARY OF ARGUMENT

This action constitutes an effort by the Brotherhood to compel Southern to cease violating three separate *status quo* commands of the Railway Labor Act and to obtain such relief through the judicial process instead of by a strike.

In late 1959 Southern began deliberate violations of the Act by unilaterally changing working conditions by operating locomotives without a fireman. Section 6 notices to change the conditions were and are pending in the procedures of the Act. In 1960 the Brotherhood called a strike, the National Mediation Board proffered its services, and the strike was postponed. Mediation continued without success until June 1962. Although it was clear that the Brotherhood could have reinstated the strike call, it decided instead to seek redress against violations of the Act through the courts. It had previously been established that a judicial remedy was available for

violations of commands of the Railway Labor Act, and that the Norris-LaGuardia Act was not a bar to injunctive relief.

Some violations of the Act constitute also breaches of the collective agreement. While the Adjustment Board has exclusive initial jurisdiction to order a remedy for breach of contract, where the conduct is a violation of the *status quo* commands of the Act only a court can give injunctive relief. In doing so, the court must look at the agreement to determine whether a working condition is a subject thereof. In such situations the court will enjoin the violation of the Act if the working condition is embodied in an agreement and there has been a unilateral change by the carrier. It does not grant a contract remedy. The Supreme Court has not decided this precise question, but the lower court cases are all in accord.

The fact that Southern served a section 6 notice to change the working condition shows that it knew a change in the agreement was necessary to accomplish the changed condition. Its argument that its proposal was intended to clarify rather than change the agreement so clearly flies in the teeth of the facts and its own conduct that it is patently insincere. And since its section 6 notice is now pending in mediation, Southern's conduct is a violation of section 5, First, and section 6 as well as section 2, Seventh.

Where an action is brought to enjoin violation of commands of the Railway Labor Act, a demonstration of irreparable injury to the plaintiff is not prerequisite to injunctive relief. This is in accord with the intention of Congress, and it has been so held by the Supreme Court.

The Southern's arguments to the effect that the Brotherhood came to court with unclean hands is so devoid of substance that the court below found it unnecessary to discuss this question.

It should be noted that Southern offered no witnesses. It is understandable that Southern did not dare to place a

witness on the stand, subject to cross-examination, to utter the preposterous statements urged by its counsel in part on the basis of self-serving statements.

ARGUMENT

I. Preliminary Observations Regarding the Origin of This Action and Its Objectives

This action represents a choice on the part of the plaintiff between using the economic strength of the firemen's craft employed on Southern in an effort to compel Southern to cease violating the Railway Labor Act, or of using the peaceful method of invoking the authority of the courts to order Southern to cease its violations of the Act.

The Southern began late in 1959 to depart from the long-established method of operating freight trains and switching locomotives by the country's railroads with a crew of five employees, which included a fireman, App. 80, 91, 123, 166, 177. Southern began at this time to deliberately order its engineers to proceed with their train assignments or switching assignments without a fireman (helper), taken from the ranks of the firemen's craft, being employed on the locomotive as a member of the crew. At a conference held on March 25, 1960, Southern's Assistant Vice-President of Labor Relations, Mr. Lawson G. Tolleson, responding to General Chairman McCollum's protest against the operation of trains on the Washington Division without an employee from the firemen's craft being a member of the crew, informed McCollum that no new firemen would be employed on the Washington Division. App. 169, 171, 174, 180-3, 295. Later, during a conference held on July 19, 1960, at which the defendants' Mr. Tolleson and Mr. Ford, and the Brotherhood's General Chairman McCollum and Vice President Mitchell were present, Mr. Tolleson announced without reservation that henceforth Southern would hire no new employees to be assigned to the firemen's craft and that operating trains and switching locomotives without a fireman being a

member of the crew would occur on the Southern Railway System as frequently as the effect of attrition of the firemen's craft required or dictated. App. 124-5, 168.

The prompt answer to this departure from the long-established rules of employment and operating practices on the Southern Railway was a decision by the firemen's craft to strike, commencing July 26, 1960. App. 183-4. The National Mediation Board promptly proffered its services and assumed jurisdiction of the dispute. App. 107, 188-9, 439. The Board asked the Brotherhood to postpone the strike and the Brotherhood complied. The Board carried on its mediatory efforts for nearly two years, but Southern could not be persuaded to alter its decision and the Board terminated its jurisdiction over the dispute on June 4, 1962. App. 189-91, 195, 223, 309.

What remedy to pursue in the effort that was being made by the Brotherhood to compel Southern to abide by the requirements of the Railway Labor Act in changing working conditions again became the pressing question facing the Brotherhood. Was a renewal of its former decision to strike the only available and necessary remedy?

There was no serious doubt that the remedy of a strike was at least available. Federal courts had only recently made this clear in a case in which the facts and legal issues were quite similar to those involved in this dispute with Southern. That case was *Butte, Anaconda & Pacific Ry. Co. v. Brotherhood of Locomotive Firemen and Engineers, et al.*, 168 F. Supp. 911 (D. Mont., 1958), *affd.* 268 F. 2d 54 (1958).

The District Court's decision, which was affirmed by the Court of Appeals for the Ninth Circuit, held that a dispute over the right of the carrier to change from a five-man crew to a three-man crew was a dispute over "working conditions" and was a "major" dispute. The Supreme Court denied certiorari. 361 U.S. 864.

The B. A. & P. litigation established that a dispute caused by a carrier violating the status quo requirements

of the Railway Labor Act (regardless of whether we think of the status quo as being fixed by Section 2, Seventh, or by Section 6 or Section 5, First) is a dispute which employees may lawfully seek to resolve by engaging in a strike.

The Brotherhood was of the opinion that the repeated and deliberate operation of trains and switching locomotives by Southern without employing a fireman (helper) on its locomotives, taken from the seniority ranks of the fireman's craft, constituted a change in the long-established working conditions to which its train crews had been accustomed; that this change was a violation of the *status quo* requirements of the Railway Labor Act, and was sufficient cause for a lawful strike by the firemen's craft. At the same time the Brotherhood held the view, as do the other transportation organizations, that Section 2 (45 U.S.C. Sec. 152) of the Railway Labor Act is in the nature of a Bill of Rights, declaring rights and duties as between employers and employees in the railway industry of so fundamental a nature that they should be judicially remediable and beyond the need of enforcement by resort to economic warfare.

These rights and duties are several in number. There is the duty upon carriers and their employees, acting through their representatives, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." This is followed by the requirement that all disputes between carriers and their employees "shall be considered, and, if possible, decided * * * in conferences between representatives designated and authorized so to confer, respectively." Section 2 then declares that employees shall have the right to organize without interference from the carrier; that the will of the majority of the employees comprising a "craft or class" of employees shall determine who shall be the representative of the craft or class, and that "representatives, for the purposes of this Act, shall be designated

by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other." Finally, there is the requirement contained in Section 2, Seventh, that rules of employment and working conditions shall be stabilized by carriers. This is accomplished by carriers being forbidden to make changes in rules of employment and working conditions without first notifying the employees affected of the intended changes and then conferring with the representatives of the employees in an effort to reach an agreement on the subject.

These are the fundamental rights and duties upon which Congress intended that relations between employers and employees in the railway industry would be bottomed. These are not merely hortatory provisions; these are not merely declarations of Congressional policy or Congressional hopes that relations between carriers and their employees would henceforth be conducted in keeping with a form of Marquis of Queensberry rules. Section 2 spells out firm legal duties which the Congress intended would be enforced, if need be, by the courts.

That this is so was settled by two decisions of the Supreme Court rendered in the early days of the Railway Labor Act. The first of these decisions was *Texas & N.O.R. Co. v. Bro. of Ry. and S.S. Clerks*, 281 U.S. 548 (1930). This was an action brought by the Clerks' Brotherhood for an injunction to restrain the Texas & New Orleans Railroad from interfering with and coercing its craft of clerical employees in the selection of their representative for collective bargaining purposes. To combat the Brotherhood's efforts the Railroad had organized certain of its clerical employees into a company union. The District Court issued a temporary injunction forbidding the T. & N. O. Railroad from recognizing or treating with the company union officials and also requiring it to restore certain discharged clerks to their jobs. T. & N. O. chose to disregard the injunction. The carrier's

officers were held in contempt and ordered to purge the contempt. The Court of Appeals affirmed the decree issued by the District Court. The Supreme Court, speaking through Mr. Chief Justice Hughes, affirmed the actions of the lower courts as being the appropriate instrumentality of achieving the purpose of Congress in enacting the Railway Labor Act and held that the right declared in Section 2 that employees shall have the right to organize without interference from the employer, was clearly an enforceable right:

“While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded.” (281 U.S. 548, at 568).

For those who thought that the affirmative declarations of duties contained in Section 2 of the Act were “imperfect obligations,” this thought was permanently dispelled by the second landmark decision issued by the Supreme Court in *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). This case involved the enforceability of the duty declared in Section 2, First of the Act, which says:

“It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. * * *”

The Virginian Railway insisted that this language could not properly be interpreted as imposing upon carriers a legally enforceable duty to negotiate and bargain with their employees' representatives, and that if the Act were to be so interpreted it would constitute an obligation that could not be “the appropriate subject of a decree in equity.”

The Supreme Court, speaking through Mr. Justice Stone, recognized in Section 2, First, a basic obligation

imposed by the Congress upon carriers and their employees, an obligation which Congress anticipated would be enforced by the courts should the occasion for such action arise. Said the Supreme Court:

"But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to 'treat with' respondent Federation 'and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.' "

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"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Railway Clerks Case, supra, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction."

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"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. *Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest*

than they are accustomed to go when only private interests are involved."

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"The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." 300 U.S. 515, at 544, 545, and 552. (Emphasis supplied.)

The duty on the part of carriers and their employees to "*maintain* agreements concerning rates of pay, rules, and working conditions" is set in the same context in Section 2, First, as is the duty to "*make*" such agreements. The plaintiff Brotherhood in the instant case makes the assumption that the tenor of the decision rendered by the Supreme Court in the *Virginian Railway* case is equally applicable to the statutory injunction requiring carriers and their employees "to exert every reasonable effort to *make* • • • agreements." This duty, required of carriers, to "*maintain*" agreements until they are modified in the manner prescribed by the Railway Labor Act is echoed in the *status quo* requirements of the Act found in Section 2, Seventh, and in Section 6 and Section 5, First.

It was in the light of these considerations that the plaintiff Brotherhood made a choice late in 1962 between the remedies which it believed to be available to it for the purpose of requiring Southern to *maintain* in effect the long-established rules of employment and working conditions as embodied in the May 17, 1950, National Diesel Agreement, and its predecessor May 11, 1944 agreement, while such agreement remained intact.

The choice that the Brotherhood made is the instant suit.

II. Legislative History of Section 2. Seventh

We have previously pointed out that one of the fundamental conditions which Congress sought to achieve by the enactment of the Railway Labor Act was the stabilization of working conditions in the railway industry. Congress sought to accomplish this by incorporating in the 1926 Railway Labor Act a sweeping requirement that whenever a carrier intended to make any changes in existing rates of pay, rules, or working conditions the employees affected must be notified of the intended change and conferences must be held with a view to reaching an agreement on the proposed changes. In every case in which such notice was given, the Act provided, the carrier was forbidden to make the intended change until after the procedure prescribed by the Act had been complied with, including the mediatory efforts by the Board of Mediation if its jurisdiction was invoked. Section 6 of the 1926 Act laid down this requirement in the following language:

"Sec. 6. Carriers and the ^{in agreement} representatives of the employees shall give at least thirty days' written notice of *an intended change affecting rates of pay, rules, or working conditions.* * * *. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Board of Mediation, * * *." (May 20, 1926, C. 347, Sec. 6, 44 Stat. 582) (Emphasis added)

This procedure of conferring with employees on proposed changes in rates of pay, rules of employment, and working conditions in advance of making the changes was not left to the election or will of management. Section 2, Fifth of the Act (the forerunner of the present Section 2,

Seventh) made the requirement firm by the following language:

“Fifth. Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto.” (May 20, 1926, C. 347, Sec. 2, 44 Stat. 577.)

If the language of the 1926 Act were now in effect no one could be heard to contend that Southern could lawfully decide to start operating its trains and switching locomotives without firemen (helpers) being members of the crew without first notifying the craft and bargaining on the subject in the manner prescribed by the Act. The changes which carriers were forbidden by the 1926 Act to put in effect, otherwise than in the orderly manner prescribed by the Act, were not limited to changes in *agreements* governing rates of pay, rules, or working conditions. The changes forbidden by the 1926 Act were changes in existing rates of pay, rules, or working conditions *regardless of whether these items or conditions were embodied in agreements*, or had been established by management's directives, or had simply developed as a matter of custom or practice.

This question may naturally arise: Why did Congress seek to stabilize wages, rules, and working conditions? Legislative history provides a clear and facile answer.

During hearings held on the Howell-Barkley Bill in 1924,* a spokesman for the railway labor organizations testified as follows:

“Certainly the power on the one hand and fear on the other hand of arbitrary change will breed discord not harmony.

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* The Howell-Barkley Bill (S. 2646 and H.R. 7358) was reintroduced on January 7, 1926 (S. 2306) and became known as the Watson-Parker Bill. The latter Bill was adopted without material change on May 20, 1926, and became the 1926 Railway Labor Act.

"Take, for example, the situation which was the cause of the shop craft strike, one of the main causes of it was that the railroads contracted out entire shops without notice That was an example of arbitrary action." (Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 2646, 68th Cong., 1st sess., pp. 19, 22)

During debates in Congress while the proposed law was under discussion it was made plain that the purpose of the Bill was to prevent unilateral action by the carriers in prescribing and changing terms of employment and to make responsibility for change joint on the part of management and labor. Thus Congressman Robinson stated:

"When we had the railroad bill up in 1920 many of the railroad owners and managers insisted that they and they alone should absolutely control and operate the railroads and that the railroad workers should be indicted and tried as criminals if they quit work and struck; while, on the other hand, many of the railroad workers in putting forth the Plum plan, insisted that they should control and operate the railroads of America. Both were partly right and partly wrong. This bill provides that both groups should run and operate the railroads of America.

" . . . It [the bill] takes the Government out of the railroad business and places the operation of the railroads in the hands of the railroad owners and the railroad workers." 67 Cong. Rec. 4703.

During hearings on the 1924 Bill a principle spokesman for the sponsors of the Bill stated as follows:

"Now the proposed bill provides that there shall be no change without notice. . . . The requirement of notice of changes is not unreasonable or new; it is obviously an essential to peaceful operation under agreements whereby neither party may be suddenly confronted with a peremptory demand for a change, whereby the fear of such a demand hangs always over the heads of both parties." Hearings on S. 2626, 68th Cong., 1st sess., Sen. Comm. on Int. Comm., p. 201.

Earlier he had testified before the same Committee:

"This prohibition against arbitrary action is a clear necessity in founding industrial peace upon contractual obligations." 19-20.

On the floor of the House, Congressman Casey of Pennsylvania gave this explanation concerning the 1924 bill:

"This bill does not prevent any change in rates of pay or working conditions, unless the parties agree to change.

"It does prevent an arbitrary change of wages or rules without notice or opportunity for conference, after which, if an agreement cannot be reached, the parties are free to act independently." 64 Cong. Rec. 8923.

With the enactment of the 1934 amendments to the 1926 Act Congress modified its original determination to stabilize all rules of employment and working conditions in the railway industry. Section 6 was changed to require notice from management to the employees and bargaining on the proposed changes when the carrier "intended changes in *agreements* affecting rates of pay, rules, or working conditions." Section 2, Fifth, of the 1926 Act became Section 2, Seventh, in the 1934 amendments, and it was modified so as to become a clear prohibition against carriers making changes in "rates of pay, rules, or working conditions of its employees, as a class, as *embodied in agreements*," other than when accomplished in the orderly manner prescribed by the Railway Labor Act.

Thus, the clear purport of the 1934 amendments was to stabilize those rates of pay, rules of employment, and working conditions that are "*embodied in agreements*."

III. To Enforce Section 2, Seventh, the Courts Must Examine an Agreement Sufficiently To Determine Whether a Working Condition Is a Subject Thereof

The defendants, if they had their way, would abort the purpose of Section 2, Seventh, in its entirety by their contention that the Court may not presume to look at the agreement which embodies the working condition which the carrier is charged with peremptorily changing sufficiently to determine whether the agreement deals with the working condition. The Court, defendants contend, may not hear evidence bearing upon the origin of the contract rule or what it was intended to accomplish or how it has been applied in the past.

If these contentions are sound, then Section 2, Seventh, is for all practical purposes written out of the Railway Labor Act. We respectfully suggest that defendants' contentions are palpably unsound. This is true for a number of reasons.

First, the evidence establishes that Southern's management has announced without qualification its decision to hire no more employees in the firemen's craft and that it will intentionally and deliberately operate its freight trains and switching locomotives without an employee taken from the fireman's craft being a member of the crew. The evidence makes clear Southern's intention to continue and expand this practice until the firemen's craft has been extirpated, and its determination not even to discuss the matter with its employees' representatives. See President Brosnan's letter of December 12, 1962 to Brotherhood President Gilbert, App. 441-43.

The record establishes with equal certainty that from August 11, 1944, to the latter part of 1959 the train and switching crews employed on the Southern Railway System consisted of five men and that one of the five was a fireman (helper) taken from the seniority ranks of the firemen's craft. Prior to the latter part of 1959 this was the standard and uniform operating practice of the

country's railroads, including the Southern, under the Diesel Agreement. There had been no calculated departures from this practice.

Secondly, the practice which Southern commenced late in 1959 of sending freight trains and switching crews on their assignments with a crew of only four men, the fireman (helper) being absent, is manifestly a change in the working conditions that theretofore obtained on the Southern system. That this change in working conditions has in fact occurred, no amount of argument can obscure. Indeed, Southern has at no time disputed this fact. App. 141.

Aside from the importance to employees of their rates of pay, the consist of train crews and switching crews is probably the one working condition of greatest importance and concern to the employees of the engine and train-service crafts. It should be apparent that if a train crew of five men is reduced to four by eliminating the engineer's helper, the burden and responsibility borne by the engineer is heightened. When mechanical troubles develop en route among the several power plants that make up the modern Diesel locomotive, the time required by the crew to complete its run and assignments will likely be materially prolonged. The extent to which the number of employees comprising the crew is reduced has a direct bearing upon the personal safety of each member of the crew and on the traveling public that comes in contact with the train or the switching locomotive.

No serious dispute can arise over the conclusion that reducing the consist of train and switching crews by eliminating the engineer's helper represents a change in the rules of employment and the working conditions of railway employees. It is the kind of change that is forbidden by Section 2, Seventh of the Railway Labor Act when the presence of the fireman as a member of the crew is "embodied in agreements." At no time has appellant questioned the fact that reducing the consist of train and

switching crews constitutes a change in "working conditions".

Thirdly, no one can entertain any substantial doubt that the simple language of Section 4 of the Diesel Agreement calls for an employee, taken from the ranks of the firemen's craft, to be employed on each locomotive operated by the Southern Railway. This is to say that the use of a fireman as a member of each train crew and switching crew is indisputably "embodied" in the Diesel agreement, that is, a working condition is "embodied" in an agreement if it is authorized by or had its foundation in or is in compliance with the language of an agreement.

What Southern is in fact contending—the issue that is at the bottom of this litigation—is that Section 4 of the Diesel agreement says something *in addition to* the statement that an employee "taken from the seniority ranks of the fireman shall be employed on all locomotives." Southern contends that Section 4 says, in addition to saying literally that an employee taken from the seniority ranks of the firemen's craft shall be employed on all locomotives, that if Southern's management should decide to cease hiring new firemen and hence there ceases to be firemen available for employment on locomotives, then Southern is relieved of the requirement of employing a fireman on each locomotive. The natural and normal meaning of the language in Section 4, Southern contends, may thus be read and understood as meaning something quite contrary to its literal meaning.

When an existing condition of employment is "embodied" in a collective agreement (and surely the employment of a fireman on all locomotives is a condition of employment embodied in the Diesel agreement), and this condition of employment is changed by the carrier with the explanation that the language in the collective agreement contains a hidden meaning, or the language is subject to an interpretation never theretofore given to it by the parties, two results flow from this development.

The first result is that there is at least a change in working conditions and therefore a *prima facie* violation of the prohibition contained in Section 2, Seventh. The second result is, or should be, that the carrier has the burden of demonstrating that it has not violated the statutory injunction against changing rules of employment or working conditions "as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this (Railway Labor) Act."

Until such time as Southern discharges this burden of proof, or obtains a change in the agreement, we believe that the rights of Southern's employees, and also the interest and welfare of the public, as expressed in the Railway Labor Act, require Southern to respect the *status quo* requirements of the Act. Southern made no effort to meet this burden.

Fourthly, Southern contended throughout the trial that the Court would be exceeding its authority if it undertook to understand what Section 4 says. This contention, Southern explained, was justified or necessitated by the decisions of the Supreme Court in *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1949); *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); and *Order of Railway Conductors v. Southern Ry. Co.*, 339 U.S. 255 (1950).

In each of these cases the dispute which led to the litigation arose in the course of a routine application or enforcement of the terms of a collective agreement. The disputes posed difficult questions, the answers to which turned upon numerous considerations peculiar to the railroad industry and upon understanding railroad jargon. In each of these cases a lower federal or a state court had presumed to grasp and evaluate the many conflicting considerations relative to deciding a dispute regarding the employment rights of certain employees or the obligations of a carrier toward certain of its employees. The Supreme Court held that a labor dispute of this nature should be decided by

experts. The lower courts were ordered to permit the main question at issue to be decided by the Adjustment Board. These decisions by the Supreme Court are now generally referred to in the railway industry as establishing "the *Slocum* doctrine."

In the instant case Southern presumed to borrow the *Slocum* doctrine from its setting and use it as authority for the proposition that it prevented the District Court from enforcing the prohibition of Section 2, Seventh.

The Supreme Court has not issued a decision having this effect.

The proposition urged by Southern implies that although Congress, by enacting Section 2, Seventh, forbade the peremptory changing of working conditions "as embodied in agreements," and the Supreme Court in the *Virginian Ry.* case appeared to be of a clear conviction that the basic duties and commands in Section 2 would, "in a proper case, be enforced by the courts" (300 U.S. 515, 545), yet the *Slocum* doctrine places the enforcement of the prohibition in Section 2, Seventh, beyond the power of the courts. It is clear that the prohibition in Section 2, Seventh, is operative only if the working conditions that have been changed are "embodied in agreements," but, Southern contends, the courts may not examine the agreements sufficiently to determine whether the rules or working conditions that have been changed or are about to be changed are in fact embodied in an agreement.

Southern has reached a conclusion, by *a priori* reasoning, which we submit is unreasonable and unsound. Southern reaches this conclusion simply because in the *Slocum* doctrine cases and in the instant case there is present the common element of a collective agreement. *What the Southern's conclusion neglects to take into account is that the purpose of the Slocum doctrine and the purpose of Section 2, Seventh, are wholly different and unrelated.*

District Judge Murray, in the *B. A. & P. Ry.* litigation (168 F. Supp. 911) did not recognize in the *Slocum* doctrine any obstacle to discovering in the firemen's and trainmen's agreements that switching crews were to consist of an engineer, a helper, two brakemen, and a conductor, and then arriving at the conclusion that the proposed use of three-man crews, consisting of an engineer, one brakeman and a conductor, would be a violation of the *status quo* requirements of the Railway Labor Act. This conclusion was affirmed on appeal. 268 F. 2d 54 (1958).

The only case that has been before the Supreme Court which presented a factual situation approximating the instant case is *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960). But in that case there was no issue or discussion regarding the applicability of the *Slocum* doctrine, nor were the railway labor organizations involved in the *M-K-T* litigation seeking judicial enforcement of the prohibition in Section 2, Seventh. Several important changes in working conditions had been peremptorily made by M-K-T and these were challenged by the organizations on the grounds that they were violations of provisions in the organizations' collective agreements. When M-K-T made clear its determination to disregard the organizations' protests the employees prepared to strike. The strike was thwarted by a temporary restraining order, and the M-K-T thereupon submitted to the Adjustment Board the dispute over the interpretation of the agreement. The District Court ordered that the injunction remain in effect on the basis of the ruling in *Chicago River & Indiana R. Co. v. Bro. of Railroad Trainmen*, 353 U.S. 30, but at the same time the court imposed upon M-K-T an order requiring it to restore the *status quo* of the operating conditions as they existed prior to the changes.

We invite attention to two significant facts in connection with this decision. One is that the District Court read the rules of the collective agreement in dispute and

assumed to understand them sufficiently to issue a conditional order requiring a restoration of the former operating conditions and was prepared to punish by contempt proceedings any violation of such order by the M-K-T. On appeal the Court of Appeals reversed this part of the District Court decree on the ground that the Court had erred in presuming to understand the disputed rules sufficiently to issue an order contemplating the restoration of the *status quo*. 266 F. 2d 335. The Supreme Court disagreed with this see-nothing, know-nothing principle announced by the Court of Appeals. Said the Supreme Court:

"The Court of Appeals apparently concluded that a decision on the merits was inherent in the very conditioning of the injunction. It is true that a District Court must make some examination of the nature of the dispute before conditioning relief since not all disputes coming before the Adjustment Board threaten irreparable injury and justify the attachment of a condition. To fulfill its function the District Court must also consider the hardships, if any, that would arise if the employees were required to await the Board's sometimes long-delayed decisions without recourse to a strike. *But this examination of the nature of the dispute is so unlike that which the Adjustment Board will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the Adjustment Board.*" 363 U.S. 528, at 533. (Emphasis added)

The second fact to which we invite attention is that, as Appellants acknowledge in their brief (p. 28), the Supreme Court has not decided the basic question presented by the instant case, and that its decisions are not inconsistent with affirmative relief against the carrier.

We submit that the *Slocum* doctrine as declared and enforced by the Supreme Court cannot be permitted to hobble the authority of the courts to make effective the prohibitions of sections 2, Seventh, section 5, First, and sec-

tion 6. To do this the court must be informed regarding the manner in which Southern and the other railroads parties to these agreements have in the past understood them and applied them and thus to determine what the working conditions were before the Southern, alone of the railroads parties to the agreements, changed them.

The fact that a unilateral change in working conditions made in violation of the Railway Labor Act is also a violation of the collective agreement does not mean that the only remedy available is the contract remedy and the availability of this remedy prevents the courts from vindicating the requirements of the Railway Labor Act. A recent decision of the Court of Appeals for the Fifth Circuit in *Bro. of Railroad Trainmen v. Central of Georgia Railway*, 305 F. 2d 605 (1962), illustrates the procedure which we believe to be the proper procedure when the enforcement of one of the basic rights or duties defined in Section 2 of the Railway Labor Act tends to parallel the adjustment of contract violations. That action arose as a result of the discharge of the Brotherhood's general chairman, Byington, by the Central of Georgia Railway. His discharge was based on the ground that he had been encouraging and aiding trainmen to institute personal injury suits against the Central of Georgia and that this constituted gross disloyalty to the Central of Georgia as Byington's employer and was a violation of Working Rule 702. Rule 702 is part of the trainmen's rules of employment on the Central of Georgia.

Suit was brought by the Brotherhood of Railroad Trainmen and Byington against the Central of Georgia. The complaint was in two counts. The first count asserted that Byington's employment relationship to the Central of Georgia Railway did not include the obligations of loyalty and fidelity contained in Working Rule 702, and, hence, his discharge was unwarranted. The second count asserted that the discharge was unlawful for the reason that it was accomplished pursuant to a plan or scheme to

so discredit Byington and the Brotherhood in the performance of their duties as the trainmen's craft representative as to constitute "interference, influence and coercion" of the trainmen's craft in the selection of the craft representative and, hence, was conduct forbidden by Section 2, Third, of the Railway Labor Act.

The District Court held that the first count must be dismissed because it called for the adjudication of the meaning of the trainmen's rules of employment and under the *Slocum* doctrine the Adjustment Board is the only proper tribunal to interpret such agreements when the disputes concern the propriety of the discharge. The second count must be dismissed, the District Court held, because it did not state a claim under F. R. Civil P. 12 (b), and did not present a justiciable issue.

The Court of Appeals held that the dismissal of the first count was proper because of the *Slocum* doctrine. But the Court of Appeals reversed the District Court's ruling on the second count. It held that the Railway Labor Act could not be read so narrowly as to prevent the Court from reaching the charge in the second count, a charge that the some conduct was in violation of Section 2 of the Railway Labor Act. Said the Court:

"* * * And certainly it [the Railway Labor Act] is not so narrow that while it is at pains to secure an untrammelled choice of bargaining representative, a carrier would nevertheless be free to frustrate and undermine the effectiveness of such bargaining agent by securing his discharge for unfounded, false or baseless charges. The pioneer decision of Judge Hutcheson in *Brotherhood of Railway and Steamship Clerks v. Texas & New Orleans R. Co.*, S. D. Tex., 1928, 24 F. 2d 426, later affirmed by the Supreme Court in *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 1930, 281 U.S. 548, 50 S. Ct. 427 L. Ed. 1034 infused vitality into the Act to make certain that bargaining agents be recognized and respected as such. See also *Virginian R. Co. v. System Federation No. 40*, etc., 1937, 300 U.S. 515, 57 S. Ct. 592, 81

L. Ed. 789. If a carrier must recognize and bargain in good faith with the representative—and it surely must—then it is not free to destroy the process of collective bargaining and resolution of industrial grievances by wrongfully destroying the effectiveness of the chosen representative.

“If this is really the objective of the Railroad’s plan, it is obviously a violation of the Railway Labor Act. As such, the Courts are open to grant appropriate injunctive relief. And, of course, once such motivation is established as a fact, the public interest, if nothing else, would make injunctive relief appropriate if not compelled.” (305 F. 2d 605, at 608-9.)

The Court then recognized that the District Court, in entertaining and deciding the second count, would likely find it necessary to inquire into the merits of the dispute that, in a different aspect, belongs before the Adjustment Board. But this fact could not be permitted to deter the District Court from enforcing Section 2, Third. In this connection the Court of Appeals for the Fifth Circuit said:

“The Court, therefore, would have jurisdiction of the charge adequately pleaded in the Representation Claim if the facts bear it out. It is thus a situation in which determination of the Court’s jurisdiction will likely be simultaneous with the determination of the merits. In that process, we may emphasize only two things at this stage. On the one hand, status as bargaining representative does not insulate Byington as an employee from lawful disciplinary action. Cf. *NLRB v. Birmingham Publishing Co.*, 1958, 262 F. 2d 2, 9. On the other hand, the Railroad may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood, or Byington as its agent, in their statutory responsibilities as bargaining representatives. And in passing on the motivation for the disciplinary hearing, the Court may inescapably find itself in the position of necessarily passing on Byington’s legal status as an employee, to his benefit or detriment,

and the extent to which he therefore owes a duty of fidelity. In other words, the determination of the Representation Claim might inevitably mean judicially passing on the very merits of the Byington Claim which we have held is within the exclusive jurisdiction of the Railway Board of Adjustment so far as his personal rights are concerned." 305 F. 2d 605, at 609.

The only difference between that case and the instant case is that the conduct of the carrier in that case that allegedly constituted a breach of contract also constituted a violation of the duty imposed by Section 2, Third of the Railway Labor Act, while the conduct of the carrier in the instant case that allegedly constitutes a breach of the Diesel agreement also constitutes a violation of the duty imposed by Section 2, Seventh of the Act.

In addition to the foregoing holdings, recent decisions by two District Courts reach the same conclusion as the Court below, to the effect that in an action by a union to enjoin a unilateral change in working conditions the court may, consistently with the *Slocum* doctrine, examine the agreement for the purpose of determining whether the pre-existing working conditions were embodied in a collective agreement. Having done so, the court's investigatory task is at an end.

In *Railroad Yardmasters v. St. Louis, S. F. and T. Ry. Co.*, 53 LRRM 2092 (N. D. Texas, April 10, 1963, not yet officially reported), the carrier abolished the positions of three yardmasters at Fort Worth, and intended to abolish the fourth yardmaster position at that terminal. This action was part of a plan to eliminate the craft of yardmaster throughout the carrier's system, because it felt that such craft had become obsolete with modern developments in railroading. The work formerly performed by the yardmasters was to be absorbed by employees in other crafts. A temporary injunction was obtained against abolishing the posi-

tions at Fort Worth, and an injunction was sought against abolishing the craft there and throughout the system.

Unlike the situation here, the carrier had not served a Section 6 notice to provide for the gradual elimination of the craft, but like the situation here it was proceeding unilaterally to carry out its plan to eliminate the craft. The collective bargaining agreement reserved to the Frisco the right to eliminate yardmaster positions. The carrier contended that that was all it was doing and that the union's contentions merely created a dispute over the interpretation or application of the agreement, and that exclusive primary jurisdiction of such dispute lay in the National Railroad Adjustment Board.

The Court described the dispute as follows:

"The controversy in the present case arose from actions of the railroad designed to eliminate what it considered an obsolete employee classification without first bargaining with the certified union." 53 LRRM at 2093.

It described the third of the carriers' four arguments as follows:

"3. The dispute involved is only one over the interpretation of an existing agreement, and is therefore a minor dispute exclusively within the jurisdiction of the National Railroad Adjustment Board" 53 LRRM at 2093.

It described the union's argument as follows:

"On the other hand, the Union insists that its claim is not predicated upon an interpretation of the collective bargaining agreement, and that it makes no attempt to allege a cause of action under such agreement. It contends that the unilateral action of the Railroad in deciding upon, and in taking steps to put into effect, its plan to eliminate the yardmaster classification in the Fort Worth yard alone or on the entire line generally created a major dispute which required the Railroad to give notice to the Union, to negotiate

and bargain with it, and to comply with the other conciliatory and mediation procedures provided in the Railway Labor Act for the handling of such disputes. Its position is that the cause of action which it alleged is based upon a violation by the Railroad of the statute rather than of the contract." 53 LRRM at 2097.

It held that while the elimination of a yardmaster position might give rise to a "minor" dispute to be submitted to the Adjustment Board, the elimination of such positions as part of a plan to eliminate the craft created a change in working conditions which could be accomplished only through the procedures of the Railway Labor Act. It held that "the plan to make a change in the working conditions of the yardmasters, as a class [by gradually abolishing the class], is in the teeth of Sec. 2, Seventh, of the Railway Labor Act * * *." 53 LRRM at 2101.

In answer to the carrier's contention that only a "minor" dispute was involved, the Court said:

"The answer to the contention that this case involves only an interpretation of the existing agreement is that the Union's cause of action is based upon an alleged violation of its statutory right under the Railway Labor Act to bargain over a major dispute. The Railroad has tried to convert the suit into one calling for an interpretation of the contract by using its answer to inject that question into the case. The Act does not give a defendant, railroad or union, the power to change a major dispute into a minor one *merely by claiming in its answer that some provision of the contract is applicable.*" (Emphasis supplied.) 53 LRRM at 2102.

The injunction that the Court issued forbade the carrier from proceeding to put its plan in effect "unless and until the defendant shall have given proper notice under Section 6 of the Railway Labor Act of intent to make such changes, and shall have exhausted all procedures under the Railway Labor Act for negotiation, bargaining and mediation of major disputes, * * *."

The most recent case reaching the same decision on the same reasoning is *Chicago and W. Ind. R. Co. v. Brotherhood of Railway and Steamship Clerks*, No. 63 C 969, N. D. Ill., decided July 29, 1963, not yet reported. In that case the carriers served a Section 6 notice providing for the transfer of certain employees from the Dearborn Street Station to new facilities constructed on the western outskirts of Chicago. While that notice was pending, the carriers transferred the employees. They contended that under the collective agreement they had a right to do so and submitted to the National Railroad Adjustment Board the question whether they had such right under the agreement. Judge Perry, while recognizing that a dispute over the application of the agreement existed and was pending before the Adjustment Board, held that the conduct also constituted a change in working conditions and was in violation of Sections 2, Seventh, 6 and 5, First of the Railway Labor Act. He issued a mandatory injunction requiring the restoration of the employees to their former working conditions at Dearborn Street Station until the procedures of the Railway Labor Act had been exhausted.

IV. The Significance of Southern's Move Under Section 6 of the Railway Labor Act To Abolish the Diesel Agreement

The record relative to Southern's proposal to negotiate the Diesel Agreement out of existence is free of any issue of fact. On November 2, 1959, Southern, acting in conjunction with the other railroads of the country, initiated proceedings under Section 6 of the Railway Labor Act to abrogate the Diesel Agreement, except that the notice did not propose to cease the employment of helpers, taken from the seniority ranks of the firemen's craft, on Diesel locomotives in passenger service. App. 81, 430. The language of the proposal states the carrier's objectives in simple, forthright language. App. 430.

Southern's later proposal served upon the Brotherhood under date of September 16, 1960, is of substantially the same tenor as the joint notice served November 2, 1959.

There are but two differences of substance. The September 16, 1960, proposal goes further than the earlier notice in that it proposes to eliminate the employment of helpers in all classes of railroad service, and it proposes that the firemen's craft be eliminated by a process of attrition rather than by the wholesale discharge of the employees comprising the firemen's craft. App. 434.

The prime objective which both proposals seek to accomplish is substantially the same. This is to put upon one trained engineman responsibility for operating the Diesel locomotive and delivering trains to their destinations in safety and as scheduled, and of performing switching work without the contributions to safety provided by the lookout of a second man in the locomotive.

Conferences were held by the parties on Southern's second proposal. No dispute exists regarding the fact that Southern invoked, on or about May 31, 1962, the services of the National Mediation Board (App. 439), and the further fact that the Board has not relinquished its jurisdiction over the negotiations. App. 90, 138-9.

The National Mediation Board is vested with a large discretion in deciding when to cease its mediatory efforts and relinquish jurisdiction over a controversy initiated by a Section 6 notice. The decisions in *Grand International Bro. of Locomotive Engineers v. Morphy*, 109 F. 2d 576 (2d Cir. 1940), and *Butte, Anaconda & Pacific Ry. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F. 2d 54 (9th Cir. 1959), have so held, and we know of no contrary decisions, nor have defendants thus far asserted the law to be otherwise.

In light of these developments, Section 6 and Section 5, First, of the Railway Labor Act impose a condition upon Southern that was obviously intended by the Congress to promote its plan for bringing about orderly and peaceful changes of employment conditions in the railway industry. Section 6, after prescribing that carriers "shall give at

least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions," then imposes in clear and unequivocal language this enjoinder upon the carrier:

"* * * In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act* * * *." (Emphasis supplied.) (45 U.S.C. Sec. 156.)

Section 5, First, is an expansion of the enjoinder contained in Section 6, once the National Mediation Board enters the picture. Section 5 begins by providing that "the parties, or either party, to a dispute between employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference."

Section 5 then provides that if the Board's efforts "to bring about an amicable settlement through mediation shall be unsuccessful," the Board shall then endeavor to induce the parties to submit the controversy to arbitration. This is followed by the second enjoinder upon the carrier forbidding it to alter the *status quo*, as follows:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed *and for thirty days thereafter*, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, *no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.*" 45 U.S.C. Sec. 155, First. (Emphasis supplied.)

It should be noted that the status quo provisions of Section 5, First are broader than those in Section 6. The Section 5, First provisions require maintenance of the status quo not only with respect to rates of pay, rules, and working conditions, but also with respect to "established practices". Also, the status quo which is to be maintained is that which was in effect "prior to the time the dispute arose".

Since mediation has been invoked and is pending in the instant case, it is clear that the status quo provisions of Section 5, First are now operative but have been disregarded by Southern.

The legal consequence of Southern initiating Section 6 procedure, by first joining in a concerted move with the other carriers of the country and later initiating individual negotiations with the plaintiff and withdrawing from the national movement, is significant in two respects. The first is that it subjects Southern, as we have seen, to a second statutory injunction (in addition to that in Section 2, Seventh) forbidding it to change the consist of its crews by operating its locomotives without a fireman being a member of the crew, until such time as the Diesel Agreement is modified or abrogated pursuant to the procedure prescribed by the Act.

It is significant that in *Bro. of Loc. Engineers et al. v. B. & O. R. Co. et al.*, No. 730, Oct. Term 1962, decided March 4, 1963, the Supreme Court held that the other railroads of the country are now free to resort to self-help to install their Section 6 notices of November 2, 1959 because they have exhausted the statutory procedures. The Southern was originally a party to that joint movement, but withdrew from it. App. 81-2, 129, 186, 197-9, 430, 437. It is unthinkable that the country's other railroads are now free to make such changes because they have exhausted the statutory procedures but that the Southern, which has not exhausted those procedures but whose Section 6 notice is now pending in mediation with the National

Mediation Board, is ahead of the other railroads and has had the right for some years to put its proposal in effect.

The second respect in which Southern's move under Section 6 is of importance to the instant action is that it is in the nature of an admission that the Diesel Agreement stands in the way of Southern's decision to operate its Diesel locomotives with only one engineman being responsible for its operation. It is fair to assume that the managements of some 200 railroads do not engage in protracted collective bargaining on a national scale to bring a collective agreement to an end if the same result can be achieved by simply proceeding to disregard the agreement in the manner Southern has been doing. This observation is a truism. The feeble explanation belatedly offered by Southern in an attempt to avoid this self-evident truth, by asserting that the Section 6 notice served by Southern under date of September 16, 1960, was intended merely to "clarify" Southern's right under Section 4 of the existing agreement to engage in one-man operation of Diesel locomotives, is simply too gossamer to justify an extended argument to refute such explanation.

V. Southern's Contention That It Is Not In Violation of Sections 5 and 6 of the Act Because Its Pending Section 6 Notice Was Intended As a "Clarifying" Amendment Staggers Credulity

Permeating Southern's brief is a basic proposition on which most of their legal arguments are predicated. Indeed, all their arguments to the effect that they are not violating Section 2, Seventh, Section 5, First, and Section 6 are dependent on the proposition (a) that Southern has not unlawfully changed the working conditions by deliberately, persistently, and with increasing frequency operating trains without firemen, (b) that Section 4 of the Diesel Agreement has always meant that the carrier would assign firemen to locomotives only to the extent that it already had firemen, and (c) that Southern's pending Sec-

tion 6 notice was intended not to change working conditions embodied in agreements but only to "clarify" them.

Southern first asserts, and then assumes it has thereby been established, that its Section 6 notice was intended as "clarification", and it then predicates most of its arguments on such assumption. It offers nothing in the record in support of such assumption. Indeed, everything in the record pertinent thereto is to the contrary. It amounts simply to the startling assertion that a provision that a fireman, taken from the seniority ranks of the firemen, shall be employed on every locomotive means "on its face" that a fireman need be employed only to the extent that the Southern already had firemen. Southern says that Section 4 of the Diesel Agreement has a built-in formula for eliminating firemen by attrition. They say that their current Section 6 proposal, reading as follows:

- "A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, which require the employment or use of a fireman (helper) on other than steam power in any class of service.
- "B. Establish a rule to provide that Management shall have the unrestricted right, under all circumstances to determine when and if a fireman (helper) shall be used on other than steam power in any class of service.
- "C. The foregoing will be made applicable only through the process of attrition, i.e., through death, retirement, resignation or discharge. Men now holding seniority as fireman and/or engineer will continue to have all rights they have under the present Agreements, but hereafter Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever." (App. 434-35.)

is to be found in, and is merely a clarification of, Section 4 of the Diesel Agreement, which reads in pertinent part as follows:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives: * * *." (App. 416.)

It borders on the incredible that anyone could make such a contention and even urge that such conclusion is apparent "on its face". It is significant that only recently has Southern made such assertion of the meaning of Section 4 of the Diesel Agreement. Its Section 6 notice does not contain the slightest hint that it was intended as "clarification". At conferences on that notice Southern made no suggestion that its notice was intended simply to effectuate "clarification". App. 136-38. When this dispute first arose, and for some time thereafter, Southern's management repeatedly took the position that it should not hire additional firemen when there was a shortage on some divisions because fairness called for giving preference to men on other divisions who were furloughed. App. 327, 405. During that time it took the position that it should not employ additional firemen to comply with the Diesel Agreement so long as hundreds of furloughed firemen had the opportunity to work. During that time there was no contention by Southern of contractual right to operate locomotives without firemen. It was only later that it took the position, now asserted by its counsel, that Section 4 of the Diesel Agreement does not mean what it plainly says, and that Southern's pending Section 6 notice was intended for "clarification" and not to effectuate changes.

The invalidity of this recent position is not only patent but it emphasizes the insincerity of Southern in offering this explanation and its defiance of the Railroad Labor Act.

Southern's second Section 6 notice, the one that is now pending, proposed to "Eliminate all agreements, rules, regulations, interpretations and practices, however established, which require the employment or use of a fireman (helper) on other than steam power in any class of service" except that Southern would continue to be required to use a fireman if one was available. This is

obviously a recognition that such rules exist, else they would not propose to eliminate them. It did not propose to eliminate such rules with respect to steam power. Also, similar to its original Section 6 notice which was made in concert with the other railroads of the country, it proposed to "Establish a rule to provide that Management shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in any class of service" (except to the extent that firemen already had seniority). This also is a recognition that it did not then have such unrestricted right, and it did not seek to acquire it with respect to steam power. It proposed to "establish" such a rule, except with respect to steam power. It takes considerable effrontery to say, as Southern argues, that when it proposed to "establish" such a rule, except with respect to steam power, it meant that it was proposing to clarify that it already had such right, with respect to Diesel power and presumably steam power too.

It takes even greater effrontery for Southern to argue, as it does, that when it proposed in Section C of its September 16, 1960 notice (App. 435), the proposal now pending before the National Mediation Board, that "*hereafter* Carriers will have no obligation to hire additional firemen (helpers) on other than steam power under any circumstances whatever", it meant not only that "*hereafter*" it should have no such obligation but also that theretofore it had not had such obligation.

It is significant that Southern did not see fit at the trial to offer a witness to introduce any such evidence, in open court and subject to cross examination. In any event, there is nothing in the record to support the contention that the carriers' pending Section 6 notice was intended as merely clarification, and the only testimony on the subject is to the effect that in negotiations Southern, in explaining its proposal, stated that the notice proposed to *change* the existing agreements and did not state that it was proposing to clarify the agreements. App. 136-38.

VI. A Demonstration of Irreparable Injury to the Plaintiff Is Not a Condition Precedent to the Enforcement of a Statutory Mandate

Appellants urge the proposition that the status quo requirements of Section 2, Seventh, Section 5, and Section 6 cannot be enforced in this proceeding because of a rule in equity jurisprudence to the effect that the extraordinary remedy of a mandatory injunction will not issue unless the plaintiff demonstrates that he is about to suffer immediate and irreparable injury, and that this the Brotherhood has failed to prove. In arguing that this rule is an obstacle to the enforcement of the Act's mandates, Southern makes no effort to demonstrate that this condition applies to a proceeding to enforce statutory commands in the same manner that it applies in an action in which one party seeks to enforce a private right against another party. Defendants would have this Court believe that although an enactment by Congress requires a party to perform an affirmative duty, or prohibits a private party from engaging in some act or conduct, the statutory command may not be enforced by a court at the instance of a private party if the latter fails in an enforcement proceeding to fulfill or satisfy the rules, principles, and maxims of equity jurisprudence which qualify or condition the granting of equitable relief in an action between private parties, involving personal rights and duties.

We believe we need cite but one authority to dispose of defendants' contention. That authority is *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). The authority of that decision for the proposition that the statutory rights and duties declared in Section 2 of the Railway Labor Act shall be enforced by the courts whenever violation of those rights and duties has occurred has not been questioned since the day that the decision was handed down by the Supreme Court. In that case the Supreme Court said:

"More is involved than the settlement of a private controversy without appreciable consequence to the public. The peaceable settlement of labor controversies,

especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

.

"The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, *Tobey v. Bristol*, *supra*, enforce statutes commanding performance of arbitration agreements, *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 119, 121, 44 S. Ct. 274, 275, 276, 68 L. Ed. 582; *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 278, 52 S. Ct. 166, 170, 76 L. Ed. 282." (300 U.S. 515, at 551.)

The Virginian Railway contended that the mandatory injunction issued by the District Court requiring it to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise,"* was "not the appropriate subject of a decree in equity."** The Supreme Court rejected this argument and affirmed the mandatory decree issued by the District Court, but in doing so the Court did not so much as mention the requirement in litigation involving only private rights and duties that injunctive relief mandatory in character will be granted only when there is a showing that irreparable injury will otherwise be suffered by the plaintiff. The total absence of any consideration of this

* 300 U.S. 515, at 540.

** 300 U.S. 515, at 549.

requirement by the Supreme Court necessitates the conclusion that the requirement of "irreparable injury" has no bearing, so far as the Supreme Court is concerned, upon the enforcement of the statutory commands contained in the Railway Labor Act.

In the course of discussing the question whether Congress intended that the basic rights and duties declared in Section 2 should be enforced by the courts, the Supreme Court appears to have been satisfied to view each of these rights and duties in the same light for this purpose. Said the Court:

"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. . . . Neither the purposes of the later act, as amended, nor its provisions when read, as they must be, in light of our decision in the *Railway Clerks Case*, supra, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction." (300 U.S. 515, at 545.)

In footnote No. 3 the Court observed that Section 2 imposed upon carriers and the representatives of their employees, in addition to the affirmative duty spelled out in the First paragraph, various other obligations, and referred specifically to the duties and prohibitions contained in paragraphs Fourth, Fifth, and Seventh of Section 2.

VII. The Norris-LaGuardia Act Is Not a Bar To Injunctive Relief In This Case

We have shown above that Southern's conduct is in violation of commands contained in Section 2, Seventh, Section 5, First, and Section 6 of the Railway Labor Act. In *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, the Supreme Court specifically held (at p. 563) that the Norris-LaGuardia Act is not a bar to the issuance of an injunction against a carrier violating commands of the

Railway Labor Act. This decision of the Supreme Court has never been departed from and is a sufficient answer to such contention. Since that decision it has been repeatedly held and is now thoroughly established and undisputed that the Norris-LaGuardia Act does not apply to prevent an injunction against violating commands of the Railway Labor Act. *Graham v. Bro. of Loc. F. & E.*, 338 U.S. 232 (1949); *Tunstall v. Bro. of Loc. F. & E.*, 323 U.S. 210 (1944); *Bro. of R. Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957); *Railroad Yardmasters of America v. Pa. R. Co.*, 224 F. 2d 226 (3d Cir. 1955); *Rolfes v. Dwellingham*, 198 F. 2d 591 (8th Cir. 1952).

VIII. The Doctrine of "Unclean Hands"

The appellants seek to persuade the Court that enforcement of Section 2, Seventh, Section 5, First, and Section 6 should not have been decreed because the Brotherhood, they say, falls short of fulfilling the precept in equity jurisprudence that "he who comes into equity must come with clean hands."

We believe this contention is sufficiently disposed of by the answer that the requirement of clean hands, like the requirement that the plaintiff prove that he is threatened with irreparable injury, cannot be permitted to stand in the way of judicial enforcement of the prohibition imposed upon railroads for the benefit of the public. Nevertheless we will go further and answer the four reasons urged by defendants in support of their charge that the Brotherhood stands before the Court with "unclean hands."

Southern first says that the Brotherhood has unclean hands because the strike called by it which was set to begin July 26, 1960, was an unlawful strike. Why was this strike call unlawful? Because, Southern says, it was based upon a dispute over the interpretation of Section 4 of the Diesel agreement. This dispute is a "minor dispute," they say, and "It is settled that such strikes are unlawful," citing *Bro. of R. Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30, 39 (1957).

Southern cannot fail to know that the *Chicago River* case holds that a strike based upon a "minor dispute" may be enjoined during such period as it may be pending before the National Railroad Adjustment Board because a strike during this period would have the effect of defeating the jurisdiction of the Adjustment Board and this must not occur because Congress clearly intended that either or both parties to a railway labor dispute shall have the right to submit "minor disputes" to the Adjustment Board and have them decided by the Board.

Aside from this exception, however, a strike over a minor dispute is unquestionably a lawful strike in the railway industry.

The Supreme Court settled this proposition by its decision in *Manion v. Kansas City Terminal Ry. Co.*, 353 U.S. 927 (1957). The plaintiff in the instant case was the defendant in the *Manion* case. The Brotherhood and the employees of the Kansas City Terminal whom it represented were enjoined by a Missouri State court from engaging in a strike based upon a large unsettled docket of time claims. The Kansas City Terminal based its prayer for an injunction forbidding the strike squarely on the ground that the Congress, when it established the National Railroad Adjustment Board by enacting the 1934 amendments to the Railway Labor Act, must be presumed to have intended to outlaw all strikes over minor disputes. The Missouri state court granted the injunction, basing its decision squarely on the proposition of law urged by the Kansas City Terminal. See reports at 290 S.W. 2d 63 and 297 S.W. 2d 31.

The Supreme Court granted the Brotherhood's petition for certiorari and simultaneously ordered that the judgments of the Missouri courts be vacated. In doing this the Court adverted to its recent decision issued in the *Chicago River* case, thereby indicating that if the minor disputes over which the strike was called in the *Manion* case had been presented to the Adjustment Board for decision, an injunction to prevent the strike would be justified on the

special ground upon which the ruling in the *Chicago River* case was based.

Therefore, the ruling in the *Manion* case is a clear rejection of the Southern's contention that Congress withdrew from railway employees the right to strike over "minor disputes." Southern's assertion that the law is otherwise is simply not true.

Defendants next say that the Brotherhood comes before this Court with "unclean hands" because it failed to present its dispute with Southern to an available administrative tribunal, to wit, the National Railroad Adjustment Board. Defendants say the decision in *Int. Assoc. of Machinists v. Northwestern Airlines, Inc.*, 304 F. 2d 206 (8th Cir. 1962), is authority for this conclusion.

This is the first time that we have heard of the proposition that failing to use an available administrative remedy stigmatizes the plaintiff before a court of equity as possessing "unclean hands." This conclusion certainly does not stem from the holding in the *Northwestern Airlines* case.* That case simply holds that if an administrative remedy is available to a plaintiff involved in a railway labor dispute, "jurisdiction to grant the injunction is lacking by virtue of the Norris-LaGuardia Act." This is not a denial of injunctive relief on the ground that plaintiff has engaged in wrongdoing which has the effect of endowing him with "unclean hands." We have shown

* The *Manion* case is cited in the opinion in *Northwestern Airlines, Inc.* as authority for this statement: "Unless the party seeking an injunction has exhausted the administrative remedies available to him, jurisdiction to grant the injunction is lacking by virtue of the Norris-LaGuardia Act." This statement reflects a misunderstanding of the legal basis upon which the Missouri state courts enjoined the strike in the *Manion* case, and the legal effect of the Supreme Court's annulment of that injunction. A similar failure to understand the issue posed by the *Manion* case in the Missouri state court led to a failure in *Hilbert v. Pennsylvania Railroad Co.*, 250 F. 2d 831, to understand the legal effect of the Supreme Court's ruling vacating the injunction issued in the trial court. The vacation of the state court injunction can only mean that the right of railway employees to strike over "minor disputes" was not withdrawn by Congress when it adopted the 1934 amendments to the Railway Labor Act.

that the Norris-Laguardia Act has no application to the injunction sought in this action. But more significantly, the instant proceeding seeks judicial enforcement of Section 2, Seventh, Section 5, and Section 6 of the Railway Labor Act, and the Adjustment Board lacks authority to entertain a proceeding of this character.

The third reason offered by defendants to support the charge that the Brotherhood has unclean hands is the telegram sent by General Chairman McCollum on August 13, 1962, to Tolleson declining an invitation to meet Tolleson for the purpose of bargaining over Southern's Section 6 notice served by Southern on September 16, 1960, on McCollum.

McCollum declined to meet Tolleson on the date suggested because of prior commitments for that date. App. 233. But, for the purpose of argument, we will assume that the wire was simply a blunt and heated refusal to meet and bargain with Tolleson. Even so, we fail to see what legal connection exists between a refusal to bargain over Southern's Section 6 proposal to eliminate the Diesel agreement and the instant proceeding which seeks to require Southern to conform to the requirements of the Railway Labor Act.

If there is any legal connection between a refusal to bargain and Southern's failure to observe the prohibitions in Section 2, Seventh, Section 5, and Section 6, Southern's violation of the Act preceded the refusal to bargain. We believe it correct to say that McCollum was under no obligation to bargain on Southern's proposed elimination of the Diesel agreement when Southern had already embarked upon a course of action which established its intention to disregard the existence of the agreement.

Regardless of whether we are correct in this conclusion, the fact is that McCollum came to Washington, D. C. one week after sending the telegram and engaged in collective bargaining with Tolleson on Southern's Section 6 notice. App. 138-39, 201. This bargaining took place under the auspices of the National Mediation Board from August 21

to August 30, 1962. We submit that this demonstration of willingness to bargain with Southern expiates the worst that Southern can say about McCollum's wire of August 13, 1962.

The fourth reason advanced by Southern to support its charge that the Brotherhood was before the court below before with "unclean hands" is a renewal of Southern's effort to find in the Brotherhood's January 13, 1963, strike call a deliberate resort by the Brotherhood to self-help in derogation of the Court's assumption of jurisdiction over the instant proceeding.

The Brotherhood's President, Mr. H. E. Gilbert, explained in detail from the witness stand the procedure within the Brotherhood for calling strikes, and the reason why the presidents of this Brotherhood have over the years consistently assumed the authority to identify and limit the specific issues upon which strike action may be taken by a general chairman pursuant to the President's approval, thereby excluding all other issues which a general chairman may see fit to include in a strike ballot. App. 240-1, 243-5. When President Gilbert authorized General Chairman McCollum by wire on January 9, 1963 that he was approving a strike call, the issues upon which the strike was to be based were spelled out in the telegram (App. 463). Those issues were the mileage dispute and the vacation dispute.

If Gilbert's telegram authorizing the strike was ineffectual in limiting the strike to the two issues stated in the wire, then it must be said that he failed to achieve what he intended to accomplish and his failure was due to some overriding legal effect of which he was not aware and with which he was unable to cope.

We submit that this cannot be the case, unless Southern is able to demonstrate that the mileage dispute, the vacation dispute, and the Diesel dispute are inseparable as a matter of law—that they constitute one whole, inseparable dispute. The Southern has not asserted this to be true, and Brotherhood submits that this cannot be true.

The mileage rules, the vacation rule, and the Diesel rule stem from three separate collective agreements, each entered into independently and at widely separated times. Indeed, in informal proceedings in the Court below, the Southern indicated a willingness to go a long way toward complying with the vacation agreement, to go part way toward complying with the mileage agreement, but not to budge at all with respect to the Diesel dispute.

There can be no doubt that it would have been possible, both practically and legally, for the Brotherhood to have pressed to a conclusion its demand for a settlement of one of these disputes without there having been any reference to the other two disputes. Nor can there be any doubt that it would have been practically and legally possible to compel Southern to comply with Section 2, Seventh, and yet this would not necessarily have disposed of the violations of the mileage agreement and the vacation agreement.

In the light of the undisputed testimony, and the opportunity of the court below to judge the Brotherhood's witnesses, the court considered this contention of Southern to be unworthy of discussion.

CONCLUSION

Appellee respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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August 28, 1963

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17891

SOUTHERN RAILWAY COMPANY, *et al.*,

Appellants,

—v.—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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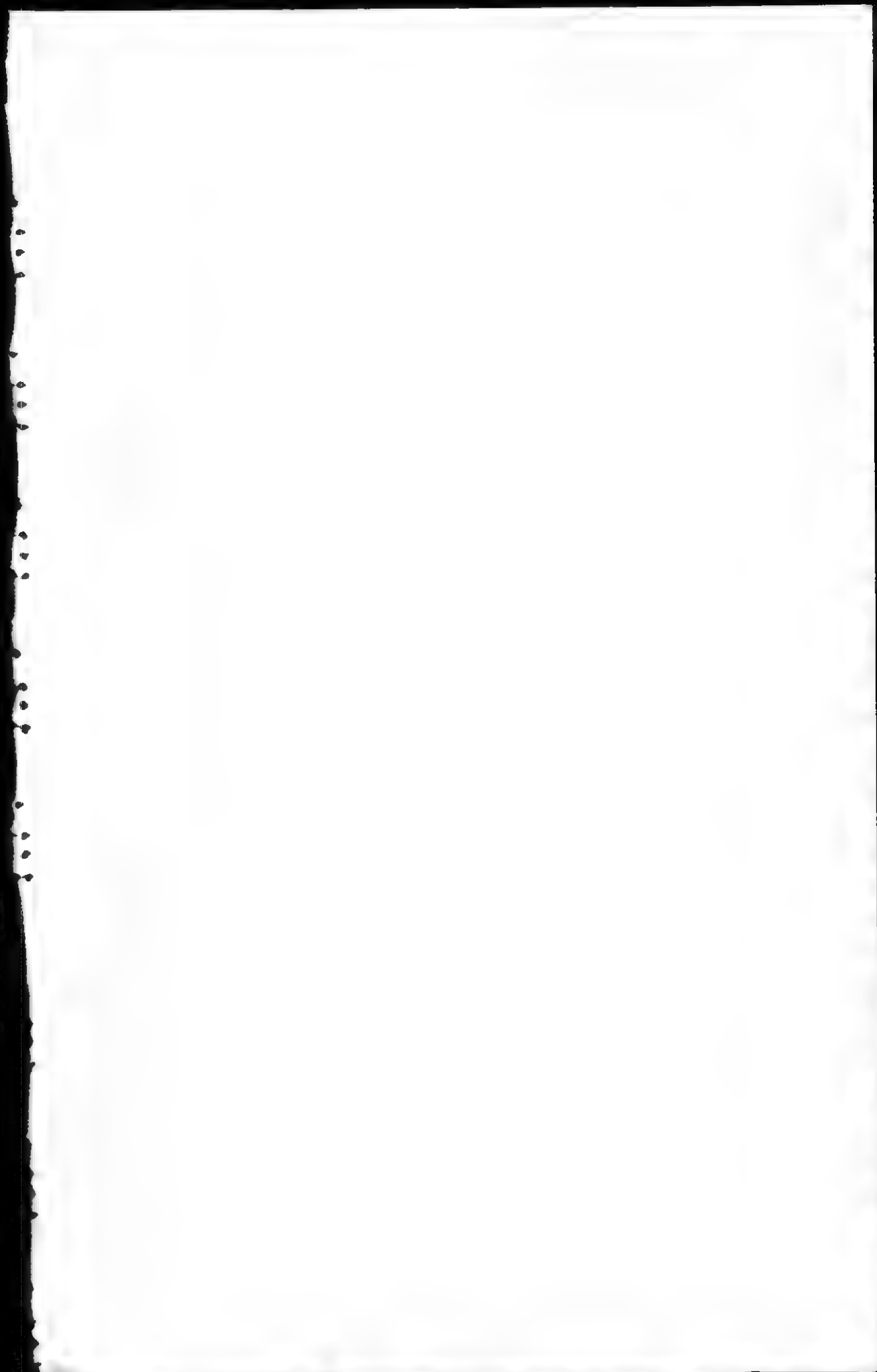
United States Court of Appeals

for the District of Columbia Circuit

FILED

SEP 12 1963

Nathan J. Paulson



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17891

SOUTHERN RAILWAY COMPANY,
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY,
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,
THE NEW ORLEANS AND NORTHEASTERN RAILROAD
COMPANY,
THE NEW ORLEANS TERMINAL COMPANY,
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,
ST. JOHNS RIVER TERMINAL COMPANY,
CAROLINA AND NORTHWESTERN RAILWAY COMPANY,

Appellants,

—v.—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,

Appellee.

REPLY BRIEF FOR APPELLANTS

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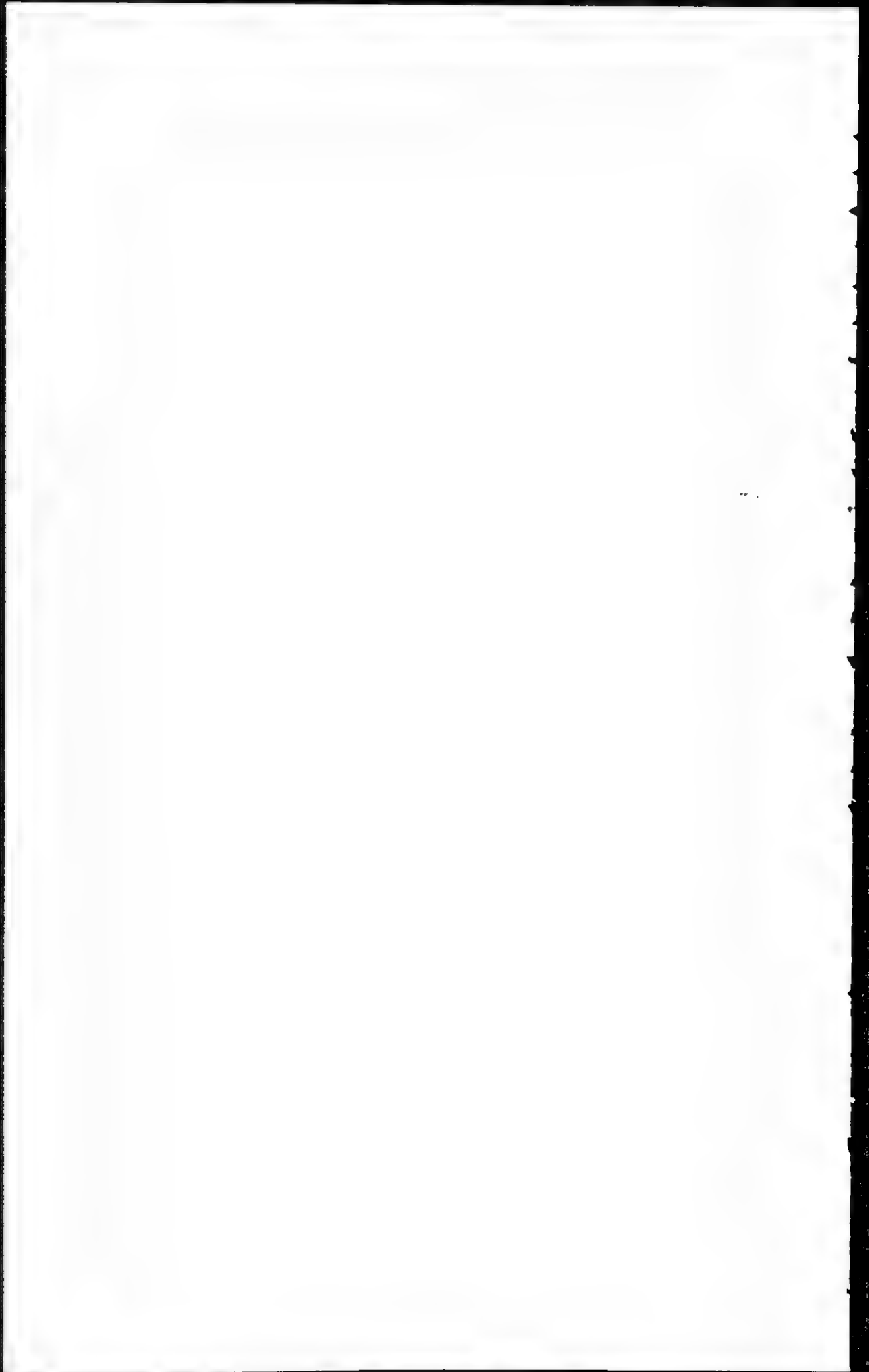
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* Cases chiefly relied upon are marked by asterisks.



POINT I

Appellee ignores entirely the District Court's ruling that a "minor" dispute is here involved.

Appellee's studied avoidance of any citation to the District Court's findings confirms our view that they do not support the mandatory injunction issued below.

For example, the court explicitly held that a "minor" dispute is involved here. That ruling was based squarely on evidence adduced by Southern, as well as upon testimony supplied by the Brotherhood's own witnesses. Southern introduced 47 documentary exhibits (Jt. A. 267-411) which demonstrate that the Brotherhood, *even in its own correspondence and internal records*, treated the controversy over Section 4 of the Diesel Agreement—the root issue here—as a "minor" dispute (see, e.g., Jt. A. 321-322).

There can be no doubt that the District Court found on the basis of clear and convincing evidence that there existed a real controversy as to the meaning of Section 4 of the Diesel Agreement. Under the decided cases, this finding is determinative and warranted dismissal on the ground of administrative exclusivity. Thus, the District Court was without jurisdiction to issue a "status quo" injunction.

A hearing (or, as appellee intimates *a priori* [Br. pp. 23-4], a pre-hearing) on the *merits* of the controversy pending before the Adjustment Board would plainly have been improper. See, e.g., *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 565 (1946); *International Ass'n of Machinists v. Eastern Airlines, Inc.*, Slip No. 20,110, 53 LRRM 2795, 47 CCH Labor Cases para. 18,370 (5th Cir. July 18, 1963, affirmance of dismissal on motion); *Hilbert*

v. Pennsylvania R. Co., 290 F. 2d 881 (7th Cir.), cert. denied, 368 U. S. 900 (1961, affirmance of summary judgment for defendant); *Westchester Lodge 2186 v. Railway Express Agency, Inc.*, 218 F. Supp. 187 (S. D. N. Y. 1963, summary judgment for defendant granted).

The cases appellee cites hold nothing to the contrary. *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of Locomotive Firemen*, 168 F. Supp. 911 (D. Mont. 1958), aff'd 268 F. 2d 54 (9th Cir. 1959), is inapposite because the court there found that there was "no dispute over the terms or meanings of the existing agreements * * *" (168 F. Supp. at p. 917). *Railroad Yardmasters of America v. St. Louis, S. F. & T. Ry. Co.*, 218 F. Supp. 193 (N. D. Texas 1963) is pending on appeal and is, we submit, contrary to the more recent decision of the Court of Appeals of the same (Fifth) circuit in *International Ass'n of Machinists v. Eastern Airlines, Inc.*, *supra* (see our Main Br. at pp. 18-21). Furthermore, the opinion in that same *Eastern Airlines* case demonstrates beyond cavil that *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 305 F. 2d 605 (5th Cir. 1962) is totally irrelevant here.

POINT II**Appellee distorts the purport of Southern's September 16, 1960 proposal.**

The short answer to all of the Brotherhood's contentions with respect to Southern's September 16, 1960 Section 6 proposal is the admission by General Chairman McCollum (Jt. A. 210) that the proposal had nothing whatever to do with the underlying controversy over the meaning of Section 4 of the Diesel Agreement:

"Q. You had a lot of special conversation and such with Southern you say you did not have with other railroads? A. Not involved in the section 6.

Q. *But you were having quite a scrap all through this?* A. *Not with the Section 6 notice.*" (Emphasis added.)

When this admission is read in the light of *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (7th Cir. 1961), *cert. denied*, 368 U. S. 900 (1961) and *Rutland Ry. Corp. v. Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), *cert. denied*, 372 U. S. 954 (1963) it becomes apparent that the Brotherhood's claim based on the service of this proposal must fail as a matter of law.

Nor is this result altered by the fact that Southern's September 16, 1960 proposal was phrased prospectively. Virtually all bargaining proposals are so phrased whether or not they are meant to preserve, clarify or change a pre-existing situation. Compare the Brotherhood's proposal, A-2 of September 7, 1960, to which Southern's proposal of September 16, 1960 was a counter (Jt. A. 433).

In essence, the Brotherhood's position (Br. pp. 5-7) is simply that the mere service of a bargaining proposal by

Southern in order to quiet a pre-existing minor dispute prevented Southern from continuing to apply its pre-existing interpretation of the agreement to which the proposal related. If this position were held correct, neither Southern nor any other carrier could ever safely serve a proposal or counter-proposal to put to rest a pre-existing contractual controversy. (See our Main Br. at pp. 23-27.) Such a holding would emasculate Section 6 and frustrate its purpose.

POINT III

Section 8 of the Norris-LaGuardia Act—the “clean hands” provision of that statute—bars the relief granted below and requires reversal.

Nowhere in its long brief does the Brotherhood come to grips with the absolute requirements of Section 8 of the Norris-LaGuardia Act. This underscores the validity of our contention that its non-compliance with Section 8 is a complete defense even if Southern had violated the Railway Labor Act. See, e.g., *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 60, 66 (1944) and *Rutland Ry. Corp. v. Locomotive Engineers*, 307 F. 2d 21, 39 (2d Cir. 1962), *cert. denied*, 372 U. S. 954 (1963).

The Brotherhood offers no authorities to the contrary; and there are none. Instead it seeks to circumvent Section 8 by asserting that its threatened strike of July, 1960 was lawful (Br. 45-6), although admittedly that strike threat arose out of the “minor” dispute over Section 4. *Manion v. Kansas City Terminal Ry. Co.*, 353 U. S. 927 (1957) (*per curiam*), is offered as supporting authority.

But *Manion* merely holds that the Norris-LaGuardia Act prevents a carrier (or union) from obtaining injunctive relief against a strike over a minor dispute if the

contractual controversy has not been submitted to the Adjustment Board. In essence, such a strike, *although unlawful*, cannot be enjoined until the administrative remedy provided by the Railway Labor Act is invoked. See *Locomotive Engineers v. Louisville & N. R. Co.*, 373 U. S. 33, 40, fn. 11 (1963), where the Supreme Court so stated. Compare *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962).

Apart from the Brotherhood's unlawful strike threat in July of 1960, Section 8 of the Norris-LaGuardia Act would here be applicable for other cogent reasons. It is indisputable that the Brotherhood never invoked its administrative remedy—never submitted the root issue, the meaning of Section 4—to the Adjustment Board. Both the Seventh and Eighth Circuits have held that “Unless the party seeking an injunction has exhausted the administrative remedies available to him, jurisdiction is lacking by virtue of the Norris-LaGuardia Act.” *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F. 2d 206, 211 (8th Cir., 1962). See also *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881, 885 (7th Cir.), *cert. denied*, 368 U. S. 900 (1961); cf. *Rutland Ry. Corp. v. Locomotive Engineers*, *supra*, at pages 38-42. In *Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30, 40, fn. 22 (1953), the Supreme Court itself had indicated that Section 8 of the Norris-LaGuardia Act requires precisely this result.

The Brotherhood's inability to escape the requirements of Section 8 is further highlighted by its bland assertion that there is no legal connection between its failure to bargain in good faith concerning Southern's proposal of September 16, 1960 and the instant proceeding (Br. 48). There are a number of complete answers to this: (1) Section 8 requires compliance “with any obligation imposed by

law which is involved in the labor dispute in question"; (2) the Brotherhood has consistently insisted both below and here that Southern's proposal of September 16, 1960 is involved in this labor dispute; (3) the Railway Labor Act imposes upon both unions and carriers a reciprocal duty to bargain in good faith,* and on August 13, 1962 the Brotherhood unequivocally violated that obligation. This conduct runs afoul of the explicit provisions of Section 8 of the Norris-LaGuardia Act regardless of the Brotherhood's *a priori* assertions concerning its attempts at expiation (Br. 49).

Finally, the threatened strike of January 13, 1963 was a deliberate resort by the Brotherhood to economic coercion in derogation of the District Court's assumption of jurisdiction of the instant proceeding. This is plain from the record of these proceedings (Jt. A. 411-413, 331-340). The Brotherhood's wink, blink and nod explanation of these tactics (Br. 49) cannot alter *nunc pro tunc* the unlawful purpose of its conduct. The fact that much of this explanation consists of verbiage without benefit of record or case citation (Br. 50) serves only to reinforce this conclusion.

* See, e.g., *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U. S. 711, 721, fn. 12 (1945), *aff'd on rehearing*, 327 U. S. 661 (1946); *American Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 169 F. Supp. 777 (S. D. N. Y. 1958).

CONCLUSION

The order should be reversed with directions to vacate the mandatory injunction.

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